Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

THE ESTATE OF ROGER ROXAS AND
THE GOLDEN BUDHA CORPORATION,
Petitioners,

v.

MARIANO J. PIMENTEL, on behalf of himself
and all other persons similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL C. CATHCART
Counsel of Record
LADELL HULET MUHLESTEIN
MAGAÑA, CATHCART & McCARTHY
1801 AVENUE OF THE STARS, SUITE 600
LOS ANGELES, CA 90067-5801
(310) 553-6630
(310) 407-2295 FAX

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the court exceeded federal court jurisdiction and invaded state probate court function when, after it determined assets to be the property of the Estate of former President, Ferdinand Marcos, it took control of the estate assets, determined priority among claimants to estate assets, and ordered distribution of estate assets to a claimant?

2. Whether the Estate is an indispensable party to an action to distribute assets of the Estate, such that the court lacked authority to entertain the action?

3. Whether the court violated the jurisdictional requirements of the interpleader statute when it granted judgment to a party that lacked adversity as to the fund and the other claimants because it presented no ownership or lien claim against the fund?

4. Whether the Ninth Circuit Court of Appeals violated Petitioners' right to appeal when it failed to mention in its Opinions and Orders Petitioners' claims of error, their merits or lack thereof, offer analysis or cite authority, or rule on any of Petitioners' assertions of error?

PARTIES TO THE PROCEEDINGS
Rule 14.1(b)

The parties to these proceedings include the following: The Estate of Roger Roxas; The Golden Budha Corporation; Republic of the Philippines; Presidential Commission on Good Government;[1] Philippine National Bank; and the class of human rights victims represented by Mariano J. Pimentel.

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[1] Republic of the Philippines and Presidential Commission on Good Government successfully asserted sovereign immunity and were dismissed from the action.

RULE 26.9 STATEMENT

The Golden Budha has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Estate of Roger Roxas and The Golden Budha Corporation respectfully petition for a Writ of Certiorari to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on September 12, 2006.

OPINIONS BELOW

The original Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix (hereinafter "App.") p. 30a) was entered on May 4, 2006, and is reported at 446 F.3d 1019 (9th Cir. 2006). A subsequent Opinion of the United States Court of Appeals for the Ninth Circuit (App. p. 14a) was filed on September 12, 2006, and is reported at 464 F.3d 885 (9th Cir. 2006). A timely Petition for Rehearing was denied on November 3, 2006, and is reported at 467 F.3d 1205 (9th Cir. 2006). (App. p. 1a).

JURISDICTION

The judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 4, 2006 and amended on May 9, 2006. A timely Petition for Rehearing was filed and the Ninth Circuit's subsequent Opinion was entered on September 12, 2006. A timely Petition for Rehearing was denied on November 3, 2006. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1335 of 28 U.S.C. states:

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $ 500 or more, or having issued a note, bond, certificate, policy of insurance or other instrument of value or amount of $ 500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $ 500 or more , if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title [28 USCS § 1332], are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety and the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

STATEMENT OF THE CASE

Facts: <u>The Discovery and Theft of the Yamashita treasure, Imprisonment and Torture of Roxas</u>

Rogelio ("Roger") Roxas obtained a permit from the Philippine government to search for treasure. In 1970 he organized a group and hired laborers to search for the "Yamashita Treasure," reported to have been looted by Japanese troops in Southeast Asia during World War II and buried in tunnels in the Philippines. After approximately seven months Roxas located a system of tunnels, inside of which they discovered Japanese artifacts, a gold Buddha, approximately three feet in height which weighed an estimated metric ton, and over 1000 boxes containing bars of gold. The head of the Buddha was detachable. Inside the chest cavity were three handsful of diamonds. After removing the Buddha and some smaller gold bars to his home, Roxas blasted the tunnel closed while he attempted to sell the Buddha to finance removal of the gold.

At 2:30 in the morning on April 5, 1971, the day after a purchaser identified with the Marcos family was to have returned to purchase the Buddha, armed men from Philippine national security agencies, broke the windows of the Roxas home, pointed rifles inside and threatened to shoot if the door was not opened. The men beat Roxas' brother, ordered the family to the floor and took the Buddha, diamonds, and bars of gold. Roxas and his family went into hiding.

In May 1971 Roxas was arrested by men connected with President Marcos. He was taken to a military camp where he was beaten, threatened and tortured with electrical shocks and burning cigarettes. After two weeks of torture he escaped and went into hiding for almost a year.

When he returned to his home in July 1972, he was again arrested by Marcos thugs. He was held in prison until November 1974. Between 1974 and 1975, after the imposition of martial law, soldiers removed the boxes of gold from the tunnel site. See *Roxas v. Marcos*, 89 Ha. 91 (1998); *Roxas v. Marcos*, 969 P.2d 1209 (Hawaii 1998); and Petitioners' offer of proof in the district court, which due to its volume is not included in the appendix.

The Interpleaded Fund

In September 1972 Ferdinand Marcos created Arelma, S.A.,[2] a Panamanian corporation, which in turn funded securities account No. 165-07312 with Merrill, Lynch, Pierce, Fenner & Smith, Incorporated (hereinafter "Merrill Lynch"). (Finding of Fact 9-14, App. pp. 53a-54a).

At his deposition, forensic accountant John F. Buckley, who reviewed Marcos' financial records on behalf of the Philippine government, testified that Marcos did not have legitimate means to amass great wealth and that Buckley and the Philippine Presidential Commission On Good Government determined that the money which funded the Merrill Lynch account was ill-gotten. He further testified that the most probable source of Marcos' wealth was the treasure stolen

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[2] Named in this action as Arelma, Inc. (hereinafter "Arelma").

from Roxas, and that Marcos engaged in a pattern of concealing wealth by use of dummy corporations.[3]

Procedural Background:

The State Court Judgment

Roger Roxas and the Golden Budha Corporation[4] sued Ferdinand and Imelda Marcos in Hawaii state court in February 1988. *Roxas v. Marcos, Civil No. 88-0522-02.* Ferdinand Marcos died in September 1989. Imelda Marcos was substituted as representative of the Estate of Marcos. Roger Roxas died on May 25, 1993, the day set for trial. A personal representative was substituted in his place. Trial began in June of 1996. Judgment was entered against the

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[3] The District Court excluded Buckley's testimony on the ground that he had not provided an expert report, despite the fact that he was a non-retained percipient witness expert who formed his opinions regarding Marcos' assets in the course of employment as a forensic accountant tracing Marcos assets on behalf of the Philippine government years earlier, and therefore was not required to submit a report, and despite the fact that there was no prejudice to the parties inasmuch as Buckley provided documentation he prepared in the course of his employment with the Philippine government, and was fully deposed and testified to all of the opinions offered at trial and that opposing counsel declined an invitation to redepose the witness, well in advance of trial, if they felt they had been disadvantaged by the absence of a report. See Petitioners' Opening Brief. pp. 8-11 App. pp. 73a-77a

[4] The treasure was assigned by Roxas to The Golden Budha Corporation.

Estate of Marcos[5] in the amount of 43 billion dollars in favor of The Golden Budha Corporation for the value of the stolen treasure and in the amount of $6 million in favor of the Estate of Roger Roxas as damages for his torture and imprisonment. See *Roxas v. Marcos*, 89 Ha. 91, 969 P.2d 1209 (Hawaii 1998). It was the largest civil verdict ever awarded, before it was reduced on appeal. The $6 million judgment in favor of the Estate of Roxas was upheld. The judgment in favor of The Golden Budha Corporation for conversion (limited after appeal to that part of the treasure stolen from the Roxas home) was reduced to $13.25 million after retrial. *Roxas v. Marcos*, Civil No. 88-0522-02. The Roxas claimants' constructive

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[5] The Hawaii Supreme Court held that the substitution of Imelda as representative of the Estate was invalid because she had never been formally appointed by a court as administratrix of the estate, although she had been acting in that capacity. The judgment against the Estate of Marcos was altered to name Imelda Marcos in her personal capacity to the extent of her interest in the estate. In its Opinion the Hawaii Supreme Court stated that "If, in fact, she had been named executrix and personal administrator prior to the present appeal . . . this court would not disturb her substitution pursuant to HRCP Rule 25(a)(1) or her designation as the personal representative of the Marcos Estate." Despite the fact that it was determined that Imelda Marcos had, in fact, been appointed administratrix of the Estate of Marcos by a Filipino Court, the invalidation of the substitution was upheld on appeal on a subsequent appeal. Ha. Supreme Court No. 24605 (2005) App. p. 47a.

The substitution was made pursuant to Hawaii Rule 25, which is identical to Federal Rule 25. The identical stipulated substitution was upheld in the Ninth Circuit in the class action litigation and underlies the Pimentel claimants' judgment against Estate of Marcos, pursuant to which judgment was entered in their favor. *Hilao v. Estate of Marcos*, 103 F.3d 762, 766 (9th Cir. 1996);

trust claim for the remainder of the treasure taken from the tunnels is still pending in Hawaii state court. *Id.*

The District Court Judgment

This matter was tried as an interpleader action before Judge Manuel Real in Hawaii district court. The New York Merrill Lynch account was deposited with the court in Hawaii. The claimants were: The Estate of Roger Roxas and The Golden Budha Corporation (hereinafter sometimes referred to as "the Roxas claimants"), holders of a judgment in their favor for theft by Marcos, who claim entitlement to the fund as the owners of the stolen assets Marcos used to fund the account; Arelma, which claims ownership of the account; The Philippine National Bank claiming on behalf of the Philippine government and as the bank holding bearer shares of Aremla; the Republic of the Philippines and the Presidential Commission on Good Government, who claim ownership on the part of the government;[6] and Mariano J. Pimentel, representative of a class of individuals who were the victims of various torts committed against them under the Marcos administration (hereinafter "Pimentel or Pimentel claimants"). They do not claim ownership of the fund. Their claim is based on their status as judgment creditors of Marcos. See *Merrill, Lynch vs Arelma* United States District Court For The District of Hawaii, Case No. CV 00-595-R.

Among other findings of fact, the district court made a determination that Ferdinand Marcos was the source of the funds in the Merrill Lynch account. The district court entered

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[6] The Republic of the Philippines and the Presidential Commission on Good Government successfully asserted sovereign immunity and were dismissed from the action.

judgment in favor of Pimentel and directed the Clerk of the Court to transfer those assets to an account, in the custody of the Clerk's Office, which account had been established in the Pimentel claimant's class action, which was also tried in front of Judge Real. Conclusion of Law 22, App. p. 64a. The Ninth Circuit ordered the fund maintained until final judgment in that action. Conclusion of Law 22, App. p. 64a.

Proceedings Before The Ninth Circuit

The Estate of Roger Roxas and The Golden Budha Corporation appealed to the Ninth Circuit, as did Republic of the Philippines and Philippine National Bank. On appeal Petitioners raised dispositive, jurisdictional issues, including three grounds on which the court lacked jurisdiction to distribute assets of the estate. The Ninth Circuit's Opinion of May 4, 2006 (App. p. 30a) affirmed the judgment of the district court, as modified to allot to Roxas a share of the assets no greater than that of any class member.[7] The Opinion did not address Petitioners' assertions of error and cited no authority for its novel result, drafting, without notice, Petitioners into the class, of which they were not members. Petitioners petitioned the Ninth Circuit for rehearing, asserting both the jurisdictional arguments and that the Opinion was so incomplete as to deprive them of their right of appeal. Petition for Panel Rehearing and Rehearing *En Banc* below. The Ninth Circuit's revised Opinion of September 12, 2006 (App. p. 14a) did not address any of the jurisdictional issues. Petitioners petitioned the Ninth Circuit for rehearing

[7] The Ninth Circuit's Order Amending Opinion does not concern Petitioners or their arguments.

again, again raising the jurisdictional issues and right to appeal issues. The court denied the petition. (App. p. 1a).

Statement of Lack of Jurisdiction:

Petitioners contend that there was no basis for federal jurisdiction of this action in the district court, inasmuch as the case required the performance of probate functions by the federal court, which is an impermissible invasion of the probate function reserved to state probate courts, and because the federal court had no jurisdiction in the absence of the Estate of Marcos, an indispensable party, which was not a party to the action.

Petitioners further contend that the federal court had no jurisdiction of Mariano J. Pimentel, the class representative, to whom the court awarded the interpleaded fund, under the interpleader statute at 28 U.S.C. § 1355, pursuant to which the district court purported to take jurisdiction (Conclusion of Law 2, App. p. 60a), inasmuch as Pimentel lacked adversity as to the interpleaded fund and as to the other parties, which adversity is prerequisite to interpleader jurisdiction of the party.

REASONS FOR GRANTING PETITION

The order of the district court distributing assets belonging to the Estate of Ferdinand Marcos exceeded the jurisdiction of the federal courts, violated the due process rights of the Estate, and violated the jurisdictional requirements of the interpleader statute. Consideration of these arguments was required of the Ninth Circuit, both because they are fundamental to the right of the federal courts to entertain this action, and because they were raised by Petitioners in an appeal permitted by law as of right. In light of the important

question of federal jurisdiction, the inconsistent position of the Ninth Circuit relative to the other Circuits and the Supreme Court of the United States with respect to recognition of the probate exception to federal court jurisdiction, and the importance of the right to appeal to individual litigants and to the perception of fairness in the judicial system, the Petition should be granted.

I. FEDERAL COURTS LACKED JURISDICTION TO DISTRIBUTE THE ESTATE ASSETS TO PIMENTEL.

There are three grounds on which the district court lacked jurisdiction to distribute the fund to the Pimentel claimants. First, federal courts are prohibited from taking control of estate assets, determining priority among competing claims against the estate, and ordering distribution of estate assets. Second, the district court lacked jurisdiction of the action in the absence of the Estate, which is an indispensable party to an action concerning the disposition of estate assets. Third, the court lacked jurisdiction of Pimentel, the party to whom it awarded the fund, because the Pimentel claim did not meet the jurisdictional requirements of the interpleader statute, in that Pimentel lacked adversity as to the fund and the other parties.[8]

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[8] There is yet another ground pursuant to which the district court is prohibited from distributing the fund to the Pimentel claimants. HRS § 657 sets out a 10 year statute of limitations within which a judgment must be enforced. The Pimentel judgment was entered on February 3, 1995.The statute expired on February 3, 2005, during the pendancy of this action in the district court. No extension was requested until after the statutory period had expired. See counsel's letter of December 7, 2006 to the Clerk of the District Court, so advising the court. App. p. 98a.

A. Distribution of Estate Assets is an Impermissible Invasion of the Probate Function, which is Reserved to State Probate Courts.

The district court made a finding of fact that the Merrill Lynch account was funded by Marcos.[9] The fund has been considered at all times as an asset of Marcos' Estate. The Pimentel claim, in fact, is based upon a judgment against the Estate of Marcos. The district court took control of the estate asset.[10] The district court entertained competing claims of multiple claimants to the estate asset and determined priority among them.[11] Finally, the district court issued an order to pay the estate asset to a judgment creditor of the Estate.[12] These actions constitute an impermissible invasion of the probate function by the federal court, contrary to controlling United States Supreme Court case law.

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[9] The district court found that Ferdinand Marcos was the source of the funds in the Merrill Lynch account. Findings of Fact 14, 23; Conclusions of Law 14, 20, App. pp. 63a-64a.

[10] Finding of Fact 16, App. p. 54a.

[11] The district court found that the claim of The Golden Budha Corporation is "junior" to the claim of the Pimental claimants. Finding of Fact 38. The court found that the claim of Arelma is "subordinate" to the claim of the Pimentel claimants. Conclusion of law 21, App. p. 64a.

[12] The district court found that the Pimentel claimants are entitled to the entirety of the interpleaded assets and directed the Clerk of the Court to transfer those assets to the account in the Clerk's Office established in the original class action case (which was also heard before Judge Real), pursuant to the final judgment in that action. Conclusion of Law 22, App. p. 64a.

In *Sutton v. English*, 246 U.S. 199, 205, 38 S.Ct. 254 (1918) the Supreme Court articulated what is known as the probate exception to diversity jurisdiction in the federal courts. The Court declared:

> By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem*, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States . . . ." (Emphasis added.)

A federal court may entertain an action which has as its sole purpose the establishment of a claim against an estate, but it is only the question of debt or no debt against the estate which may be heard by the federal courts. *Galion Iron Works & Mfg. Co. v. Russell*, 167 F. Supp. 304, 309-310 (W.D. Ark. 1958). In *Yonley v. Lavender*, 88 U.S. 276, 279-280 (1874) the Supreme Court held that a creditor may secure a judgment against an administrator in a federal court and, based on that judgment, claim the amount awarded to creditors of his class in probate court, but he cannot secure an execution of that judgment and take precedence over other creditors in a federal court. The Supreme Court reiterated in *Byers v. McAuley*, 149 U.S. 608, 620, 13 S.Ct. 906 (1893) (emphasis added):

> "A [claimant] . . . may establish a debt against the estate. [Citations omitted.] But the debt thus established must take its place and share of the estate

> as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent."

In *Pufahl v. Estate of Parks*, 299 U.S. 217, 226, 57 S.Ct. 151 (1936) the Supreme Court identified specific matters which constitute "strict" or "pure" probate which are reserved to state probate courts.

> [A claimant against an estate] may not be denied his right to prosecute an action to judgment or a suit to final decree in the federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. The marshaling of that claim with others, its priority, if any, in distribution, and all similar questions are for the probate court upon presentation to it of the judgment or decree of the federal court. (Emphasis added.)

See also, Dannhardt v. Donnelly, 604 F. Supp. 796, 800 (E.D. N.Y. 1985) (orders to pay plaintiff the assets of the estate were "obviously matters which fall exclusively within the probate jurisdiction of the [state probate court] and over which the Court lacks subject matter jurisdiction"). Rarely is a federal court called upon to perform pure probate functions. However, because of the parallel purpose and structure of interpleader proceedings and probate proceedings, in which claimants are gathered to contest distribution of assets controlled by the court, when the assets held by an interpleader court are assets of an estate, that is exactly what happens.

Neither the form of the case as an interpleader action nor court control of probate assets nullifies the probate exception. As the Supreme Court explained:

> Possession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the administration of the estates of deceased persons were in the Federal court, it might by instituting such an administration . . . draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not in this case assume to take possession of the estate in the first instance, and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

Byers v. McAuley, supra, 149 U.S. at 618-619 (emphasis added).

As *Byers* states, a federal court will not entertain an action if the relief requested might have the practical effect of drawing possession of a probate res to the federal court. *See also,* 13B C.Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 3610 at pp. 490-491 (3d ed. 2001). The functions the federal court undertook in this interpleader action fall squarely within the realm of pure probate matters of which the federal courts have no jurisdiction.

Even when the matters are only ancillary to probate, if state law provides for exclusive jurisdiction of the matter in probate court, there is no federal jurisdiction. The application of the probate exception to matters ancillary to probate was thoroughly analyzed by Judge Posner in *Dragon v. Miller*, 679 F.2d 712 (7th Cir. 1982), *cert den.*, 459 U.S. 1017. The probate exception should be applied to bar jurisdiction of probate-related matters, Judge Posner wrote, when probate

jurisdiction will promote legal certainty, judicial economy, and take advantage of relative expertness. *Id.* at 714-715. The *Dragon* court declared that the judicial economy factor argues very strongly for confining the lawsuit to state court when a state has created a specialized cadre of judges or provided that certain issues may be raised only in probate proceedings. *Id.* at 715-716. When state courts have a measure of exclusive jurisdiction, the federal courts will have less experience in adjudicating the issues than the state probate courts, which factor also weighs against federal jurisdiction. *Id.* at 714-715.

Even assuming that this action were only ancillary to probate functions, federal jurisdiction would still be barred in favor of jurisdiction in state probate court. Each of the three factors identified by Judge Posner favors state probate court jurisdiction of this action. First, legal certainty always favors limiting probate-related matters to probate courts. Secondly, judicial economy favors probate jurisdiction. Both Hawaii and New York (the potential sites for probate of these assets) have created specialized probate courts to which state law grants exclusive jurisdiction.[13] Thirdly, the exclusive

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[13] Hawaii's probate statute, found at HRS §§ 560:1-101 to 560:8-102, provides that the state court sitting in probate has "exclusive jurisdiction of formal proceedings to determine how decedents' estates . . . are to be administered, expended and distributed." HRS § 560:3-105 (emphasis added). "All proceedings and actions to enforce a claim against the estate are governed by the [probate] procedure. . . ." HRS § 560:3-104 (emphasis added). Proceedings under the Hawaii probate code are exempted from the operation of the Hawaii Rules of Civil Procedure and are governed by a separate system of rules. Hawaii Rules of Civil Procedure 81(a)(1).

New York has established the distinct Surrogate's Court, for

jurisdiction of Hawaii and New York probate courts creates relative expertise on the part of its probate judges.[14] This is particularly the case when, as in Hawaii and New York, the state court has also created a separate system of rules by which probate proceedings are governed. *See* footnote 10.

Additional considerations of fairness underlie the probate exception. The Supreme Court has declared that to allow distribution of estate assets outside of probate proceedings would nullify the administration laws of the State, give creditors who could sue in federal court greater privileges in the distribution of estates than creditors who could not, place the judgments of the federal court on a higher grade than the judgments of the state court, creating conflict, and render the state powerless in a matter over which it has confessedly full control. *Yonley v. Lavender, supra,* 88 U.S. at 279-280. Such evils as the Supreme Court anticipated are more than hypothetical. Parties can deplete the Estate by means of

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the handling of all probate matters within the state, procedure for which is set forth in the Surrogate's Court Procedure Act, New York Statutes §§ 101 et seq. Section 201.3 of the Act provides, "The court shall continue to exercise full and complete general jurisdiction in law an in equity to administer justice in all matters relating to estate and the affairs of decedents, and . . . to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein. . ." (Emphasis added.)

[14] An example of the lack of expertise in issues related to the distribution of an inadequate fund among competing claimants by the district court is its decision, in the May 4, 2006 Opinion, to award the fund to individuals holding the two judgments on a per capita, rather than a pro rata basis based on the judgments. May 4, 2006 Opinion, pp. 5041, 5042, Ap. p. 44a-46a.

piecemeal interpleader cases each time a Marcos asset surfaces, while parties who are not named in the interpleader cases or who face barriers to federal court litigation are frozen out. Cases are pending or have been heard in district court in Texas,[15] Colorado, [16] and New York[17] involving the Pimentel claimants and others and alleged Marcos Estate assets.

The probate exception to federal jurisdiction applies to bar jurisdiction of this action in which the court undertook pure probate functions. Even had the case concerned merely ancillary probate-relate matters, the probate exception would apply to bar jurisdiction because of the existence of exclusive, specialized state probate systems. Where federal court jurisdiction does not exist, the action must be dismissed. *Mackey v. Pheil,* 827 F.2d 540, 543 (9th Cir. 1987).

B. The Estate is an Indispensable Party to an Action to Distribute Estate Assets.

The Estate of Marcos is an indispensable party to this action under Federal Rules of Civil Procedure Rule 19(b), without whom this action to distribute estate assets cannot be conducted. The factors to be considered in a determination of whether a party is indispensable to the action under Rule 19(b) include: first, to what extent a judgment rendered in the

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[15] (Mariano Pimentel v. B. N. Development, United States District Court for the Northern District of Texas, Ft. Worth Division, case number: C.A. No. 4-05CV-234-y.)

[16] (Pimentel vs. Denman United States District Court for the District of Colorado Case no.1:05-cv-00702-MSK-MEH

[17] (Philippines et al vs. Christies United States District Court for the Southern District of New York. Case 1:98-CV-03871)

party's absence might be prejudicial to it or other parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the party's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. Each of the factors of rule 19(b) supports the conclusion that the Estate is an indispensable party, such that this action cannot be conducted without its participation.

An action to disperse the assets of the Estate in its absence is, of course, prejudicial to the right of the Estate to participate in an action upon its property. No provision respecting the distribution of estate property to a claimant could lessen the prejudice to the absent Estate. A judgment against the Estate cannot be enforced in an action to which the Estate is not a party. Plaintiffs (in this case, claimants) have a completely adequate remedy in probate court if the action is dismissed. In order for a just disposition of estate assets, the Estate must participate. The assets of the Estate cannot be distributed piecemeal in federal court proceedings in the absence of the Estate as a party. The dispute over this fund belongs in probate court where all claimants may present their claims, and where there will be no issue respecting indispensability, either as to the Philippine government or the Estate.

C. Pimentel Lacks the Jurisdictionally Required Adversity for an Interpleader Claim.

The district court purported to take jurisdiction of this matter pursuant to the interpleader statute at 28 U.S.C.

§ 1335.[18] Conclusion of Law 2, App. p. 60a. Adversity, both as to the fund and between the claimants, is a jurisdictional requirement of interpleader. If either aspect of adversity is lacking, the non-adverse claim must be dismissed. *Gaines v. Sunray Oil Co.*, 539 F.2d 1136, 1142, 1443 (8th Cir. 1976); *Industrial Bank of Washington v. Techmatics Technologies, Inc.*, 763 F. Supp. 629, 634 (D.Dist.Col. 1991), *affd* 955 F.2d 764 (D.C. Cir. 1992).

In interpleader actions the subject matter of the action is not a set of facts, a transaction or other occurrence, but a specific identified fund or property. If a claimant does not assert an ownership or lien interest in the particular interpleader fund, its claim is not adverse to the fund and must be dismissed. *Northern Natural Gas Co. v. Grounds*, 292 F. Supp. 619, 640 (D. Kan. 1968), *affd in part, reversed in part on other grounds* 441 F.2d 704 (10th Cir. 1971). "[T]he dispute cannot involve money generally, as most disputes do, but must involve a specific fund of money and competing claims for that fund." *American Family Mut. Ins. Co. v. Roche*, 830 F. Supp. 1241, 1245 (E.D. Wis. 1993). A claimant in an interpleader action must assert a prior right, by title or lien, to the disputed fund. *Center Partners Management Ltd. v. Cache, Inc.*, 675 F. Supp. 48, 49 (S.D.Fla. 1986). A claim for damages is not a claim of

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[18] The district court also purported to take jurisdiction pursuant to 28 U.S.C. § 1655 and quasi in rem and in rem jurisdiction. Conclusion of Law 2, App. p. 60a. 28 U.S.C. § 1655 does not confer independent jurisdiction. *Georgia Central Credit Union v. Martin G.M.C. Trucks, Inc.*, 622 F.2d 137, 138 (8th Cir. 1980). Interpleader actions are in personam, not in rem, proceedings. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 521, 36 S.Ct. 613 (1916). There is no jurisdiction under the alternative grounds recited by the district court.

ownership or lien interest in a particular fund and therefore is not an adverse claim against the fund. *Id.* at 48, 49-50. A general judgment against the owner or holder of the fund is not a claim against the stake. *Airborne Freight Corp. v. United States,* 195 F.3d 238, 240, 241-242 (5th Cir. 1999); *RubinBaum LLP v. Related Corporate Partners V,* 154 F. Supp. 481, 487 (S.D. N.Y. 2001).

The Pimentel claimants do not assert an ownership or lien interest in the fund. Their claim rests upon a judgment for torts committed on them, which has no direct tie to the money, and thus may be satisfied with any money or property legally belonging to Marcos.

Nor does the Pimentel claimants' claim meet the requirement that it be adverse to the claims of the other claimants. The interpleader mechanism was devised to protect a stakeholder from double liability on a single obligation, as a result of adverse claims against the stake it holds. *Alfa Financial Corp. v. Key,* 927 F. Supp. 423, 428, 429 (M.D. Ala. 1996); 7 Wright & Miller, *Federal Practice and Procedure* § 1704 (1972). The stakeholder must be subject to multiple conflicting claims against the fund for interpleader to serve its purpose. *Gaines v. Sunray Oil Co., supra,* 539 F.2d at 1141. To be adverse to the other claims, a party's claim must present a genuine threat against the fund, be asserted against the same fund as the other claims, and be based upon a theory inconsistent with the theories of the other claims. *General Electric Credit Corp. v. Grubbs*, 447 F.2d 286, 288 (5th Cir. 1971); *Alfa Financial Corp. v. Key, supra,* 927 F. Supp. at 428-429; *Northern National Gas Co. v. Grounds, supra,* 292 F. Supp. at 640. The Pimentel claim fails to meet any of the three prongs of the party adversity requirement.

The threat of double liability occurs if, were the funds paid to one claimant, another could sue the stakeholder for having paid the fund to the wrong party. *Indianapolis Colts v. Mayor and City Council,* 733 F.2d 484, 486 (7th Cir. 1984); *RubinBaum LLP v. Related Corporate Partners V, supra,* 154 F. Supp. at 487. Where the stakeholder has no obligation to the claimant, there is no risk of double liability to the stakeholder. In *Bank One, Texas, N.A. v. Taylor,* 970 F.2d 16 (5th Cir. 1992), *cert denied* 508 U.S. 906, 113 S.Ct. 2331, the court observed that, for purposes of determining whether the bank faced rival claims to an account, absent an agreement, the bank owned no duty to the claimant and was not required to recognize his putative claim to funds held by the bank. The bank, therefore, failed to meet the first requirement for instituting a proper interpleader action. *Id.* at 24. The only liability or obligation on the part of a stakeholder is to satisfy claims against the stake itself. Because the Pimentel claim is based on a judgment against Marcos, not a claim against the fund, Merrill Lynch has no obligation to the Pimentel claimants and does not face the possibility of liability to them. Nor is there a risk to the stakeholder when the claim asserted is against a fund different from the fund the stakeholder holds. The claim must be asserted against the particular stake deposited with the court. The Pimentel claimants' judgment is against Marcos, not this fund. It is not adverse to the Roxas claim of ownership of the interpleaded fund or to the Arelma/Philippine National Bank claim of ownership of the interpleaded fund. The Pimentel claimants can satisfy their judgment against Marcos without disturbing the interpleaded funds. Their claim is not adverse.

The requisite adversity is present when the stakeholder is faced with two or more claims which are mutually inconsistent, when of multiple demands, the fund is subject to only one. There is danger of unfair double liability on the

part of the stakeholder only in cases where only one party is entitled to succeed. *Texas v. Florida,* 306 U.S. 398, 406, 412, 59 S.Ct. 563, 568, 570 (1939); *General Electric Credit Corp. v. Grubbs,* 447 F.2d 286, 288, 289 (5th Cir. 1971).

The Roxas claimants assert an ownership interest in the interpleaded fund. So does Arelma/Philippine National Bank. These ownership claims are mutually inconsistent. Only one party can own the fund. The Pimentel claimants, however, assert a claim for recovery as holders of a general judgment against Marcos. The Pimentel claim is not adverse to the claims of the other claimants because the theories of recovery are not mutually inconsistent. In the event that Merrill Lynch dispersed the fund to the Roxas claimants or Arelma/Philippine National Bank, the Pimentel claimants would simply seek satisfaction of their judgment against Marcos elsewhere. They would not be foreclosed by disbursement of the fund, nor could they sue Merrill Lynch, because they have no claim directly against this fund. The Pimentel claimants are non-adverse both as to the fund and as to the parties. Pimentel is not a proper party and must be dismissed from the interpleader case. Where a plaintiff cannot establish adversity as to one of several claimants, that claimant will be dismissed from the interpleader case. *Gaines v. Sunray Oil Co., supra,* 539 F.2d at 1442, 1443.

Petitioners' claim, on the other hand, is based on the conversion portion of its judgment and on the pending constructive trust claim. A claim need not be reduced to a judgment to be cognizable in an interpleader action. *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523, 531-532, 87 S.Ct. 1199 (1967). A constructive trust constitutes a direct claim cognizable in interpleader because it creates a duty to transfer the proceeds to the rightful owner. *Bogert*

Trusts and Trustees (2d ed. Revised 1978) § 476, pp. 119-120.

II. PETITIONERS' RIGHT TO APPEAL WAS DENIED WHEN THE NINTH CIRCUIT REFUSED TO ACKNOWLEDGE PETITIONERS' CLAIMS OF ERROR, REFUSED TO ADDRESS THEIR MERITS OR LACK OF MERITS, FAILED TO OFFER ANALYSIS OR CITE AUTHORITY, AND FAILED TO RULE ON PETITIONERS' ASSERTIONS OF ERROR.

The laws of the United States guarantee Petitioners' right of appeal from the final determination of a district court. See 28 U.S.C. § 1291 and Federal Rules of Civil Procedure rules 3 and 4. At a minimum the right to appeal ought to constitute the right to consideration, reasoning and a ruling from the court to whom an appeal of right is made. Despite repeated pleas by Petitioners that their claims be considered, the Ninth Circuit has steadfastly refused to acknowledge or consider Petitioners' claims of error, even on such fundamental issues as jurisdiction. The Ninth Circuit's treatment of Petitioners' appeal amounts to a denial of Petitioners' right to appeal.

Petitioners have raised dispositive, jurisdictional issues repeatedly at both the trial and appellate court levels. These issues were raised before the Ninth Circuit and thoroughly briefed in Petitioners' Opening Brief, Reply Brief, and two Petitions for Rehearing. No court has addressed a single word to Petitioners' jurisdictional challenges, and no court has issued a determination on their merits.

In their 65-page Opening Brief Petitioners presented arguments that: (1) the probate exception precluded federal jurisdiction of the action; (2) Pimentel must be dismissed from

the interpleader case, as he did not have the requisite adversity to either the fund or the parties; (3) Pimentel failed to meet his burden to prove that the fund was the lawful property of Marcos such that it could satisfy tort claims against him, and the court misapplied the burden of proof to Petitioners; (4) exclusion of the testimony of forensic accountant John Buckley was prejudicial error, in that Buckley was not required to submit an expert report under the rules of civil procedure and inasmuch as no prejudice resulted from his failure to do so as required under the rules; (5) the court applied an erroneous standard and excluded deposition testimony contrary to the hearsay exception for prior testimony; (6) the court made numerous erroneous findings of fact and conclusions of law.

In its original Opinion,[19] the Ninth Circuit included a paragraph describing the background and bases of Petitioners' claims against the assets at the trial court. No mention was made anywhere in the Opinion of Petitioners' assertions of error. The analysis section of the Opinion was dedicated to discussion of issues raised by the Republic of the Philippines, with the exception of a single paragraph at page 1026, which does not discuss any issue raised by Petitioners on appeal and does not cite any authority for the court's seat-of-the-pants declaration of the "fair" result.

Petitioners and others filed petitions for rehearing. In their petition Petitioners asserted that: (1) the court misapplied a rule of civil procedure to decide the merits of the case; (2) authorizing payment of a thief's debts with assets stolen from others is error and fundamentally unfair; (3) the court's novel scheme for distributing an inadequate fund among competing

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[19] App. p. 30a.

claimants lacked analysis and authority; (4) the court failed to consider Petitioners' assertions of error, including jurisdictional errors, prerequisite to distribution of the fund, in violation of Petitioners' right to appeal; (5) the court's holding treated Roxas as if he were a member of a class whose rights had been adjudicated, in violation of his constitutional right to due process; (6) the court's sanction of federal court control of estate assets exceeded federal court jurisdiction.

The holding of the Ninth Circuit's subsequent Opinion[20] did not mention or concern Petitioners. The court did not address any of the jurisdictional issues. It devoted the last two paragraphs of the Opinion to two evidentiary issues raised by the Roxas claimants, but it offered no meaningful analysis or authority and failed to address the any of the authority cited by Petitioners. It offered only the conclusory statement that the expert failed to produce the required report, without explanation and without addressing Petitioners' argument that the expert was not a retained expert and was not, therefore, subject to the report requirement, and without addressing how the failure to produce a report under the circumstances of this case, where the expert was deposed and opposing counsel declined an offer to redepose the expert if he felt his client had been prejudiced by the absence of a report, could result in the prejudice which Federal Rules of Civil Procedure rule 37 requires for exclusion of testimony.

The Opinion stated, without discussion or analysis, that five witness depositions were excludable hearsay because the cross examination in the prior proceeding was not undertaken by a party with a similar motive to develop the testimony,

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[20] App. p. 14a.

without explanation as to why cross-examination taken on behalf of the Marcoses seeking to disprove Roxas' claim that Marcos stole the treasure from him did not have a similar motive as cross-examination taken on behalf of parties in this action seeking, identically, to disprove the claim that Marcos stole the treasure from Roxas. The Opinion was so cursory and incomplete as to deprive Petitioners of a meaningful right to appeal.

Again, Petitioners petitioned the Ninth Circuit for reconsideration, begging the court to consider the issues raise in its appeal and arguing that the Opinion was so incomplete as to deprive Petitioners of their right to appeal. In an Order devoted to the argument of other parties, the Ninth Circuit denied the petition for rehearing and indicated that it would deny any further petitions.[21]

A determination on such significant issues as whether the court had jurisdiction of the case, whether the class members' claim was allowable in interpleader, whether the fund legitimately belonged to Marcos such that it could be subject to the class members' claim, and whether the legitimate owner of stolen assets has a prior right to the assets or their proceeds must logically precede any determination as to distribution of the fund. In spite of three requests that the court consider Petitioners' arguments, even such fundamental arguments as the jurisdiction of the federal court, presented in carefully researched and drafted briefs by experienced and respected attorneys, the Ninth Circuit has utterly refused to do so.

The right to appeal granted to these and other appellants by law, is not a trivial thing. It is important to the perception

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[21] App. p. 1a.

of fairness afforded by the judicial system. It is especially important in this case, where the arguments of a lone individual of humble background have been ignored as unworthy of notice while the court dealt with arguments of a foreign nation, a bank and 9,531 members of a certified class. However, Petitioners' arguments logically precede the arguments of other parties to this action. The court could not reach those arguments without first considering Petitioners' arguments. Petitioners arguments deserve the attention of the appellate court. If their arguments are faulty, the court should show them why. If their arguments have merit, the court is obligated to divest itself of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted and this Court should vacate and reverse the decision in the court below as exceeding the jurisdiction of the federal courts.

Respectfully submitted,

MAGAÑA, CATHCART & MCCARTHY
DANIEL C. CATHCART
LADELL HULET MUHLESTEIN

Attorneys for Petitioners
The Estate of Roger Roxas and
The Golden Budha Corporation

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed November 3, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,
Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,
Defendant-Appellant,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

PHILIPPINE NATIONAL BANK,
Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF)
FERDINAND E. MARCOS; IMELDA R. MARCOS;)
FERDINAND R. MARCOS, JR.; MARIA IMELDA)
MARCOS; IRENE MARCOS ARANETA; FRONTIER)
RISK CAPITAL MANAGEMENT, L.C.C., a limited)
liability company organized and existing under the laws)
of the State of Nevada, with a registered office at 6100)
Neil Road, Suite 500, Reno, NV. 89511 and an address)
at 300 Wacker Drive, Suite 900, Chicago, IL 60606;)
GROSVENOR CAPITAL LTD., a company organized)
and existing under the law of the United Kingdom, with)
an address at Grosvenor Gardens House, Suite 117,)
35-37 Grosvenor Gardens, London SW1 W OBS, United)
Kingdom; THE ESTATE OF ROGER ROXAS;)
GOLDEN BUDHA CORPORATION, a corporation)
organized and existing under the laws of the State of)
Georgia, with a registered office at 710 West First Street,)
Blue Ridge, Georgia 30513, and a mailing address at 260)
Carrollton St., Buchanan, GA 30113; PHILIPPINE)
NATIONAL BANK,)
Defendants,)

and)
)
MARIANO J. PIMENTAL, on behalf of himself and all)
other persons similarly situated,)
Defendant-Appellee,)
)
REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL)
COMMISSION ON GOOD GOVERNMENT, a)
government agency of the Republic of the Philippines,)
Defendants-Appellants.)
)

MERRILL LYNCH, PIERCE, FENNER AND SMITH,)
INCORPORATED, a corporation organized and existing)
under the laws of the State of Delaware with its principal)
place of business in New York, New York,)
Plaintiff-Appellee,)
)
v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS, a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE)
OF FERDINAND E. MARCOS; IMELDA R.)
MARCOS; FERDINAND R. MARCOS, JR.; MARIA)
IMELDA MARCOS; IRENE MARCOS ARANETA;)

FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Before: John T. Noonan, Sidney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

ORDER

The panel has voted to deny the petitions for rehearing. Judge Thomas has voted to deny the petitions for rehearing en banc and to deny any further petitions and Judge Noonan and Judge Robart so recommend.

Petitioners' fears of *res judicata* are baseless.

The Republic's claims of prejudice under Rule 19(b) are without merit, because its suit to recover the Arelma assets in the Philippines is a forfeiture action, one which a unanimous *en banc* Philippine Supreme Court has "categorically declared" is *in rem. Rep. of the Phil. v. Sandiganbayan*, (2003). The Republic has no jurisdiction over the *rem*, which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States. Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(a) (1987).

Petitioner also omits the crucial language in *American Greyhound*, *see* Pet. Reh'g at 6, which reads, "some courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002).

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed September 12, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the States of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,

Defendant-Appellant,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee,

PHILIPPINE NATIONAL BANK,

Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,

Plaintiff-Appellee,

v.)

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260)

Carrollton St., Buchanan, GA 30113; PHILIPPINE NATIONAL BANK,
Defendants,

and

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,
Defendants-Appellants.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive,

Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Before: John T. Noonan, Sidney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

ORDER

The opinion filed May 4, 2006, and amended May 9, 2006, is hereby WITHDRAWN. An amended opinion is filed concurrently with this order.

With the filing of the amended opinion, the panel has voted to deny the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judge Noonan and Judge Robart so recommend.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED, and the petition for rehearing en banc is DENIED.

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed September 12, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the States of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,
Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,
Defendant-Appellant,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

PHILIPPINE NATIONAL BANK,
Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.)

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113; PHILIPPINE

NATIONAL BANK,
Defendants,

and

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,
Defendants-Appellants.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE

OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Before: John T. Noonan, Sidney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

OPINION

NOONAN, Circuit Judge:

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimentel (Pimentel). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Federal Rule of Civil Procedure 19(b). We affirm the judgment of the district court.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000, by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1972 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143,1149-52 (9th Cir. 2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. *See* An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the Philippines*, 309 F.3d at 1153.

Pimentel is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 103 F.3d 767 (9th Cir. 1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to

human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas v. Marcos*, 89 Haw. 91, 969 P.2d 1209 (Haw. 1998). The Hawai'i Supreme Court has allowed Roxas' judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Federal Rule of Civil Procedure 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest.

Fed. R. Civ. P. 19(a). Such a party should be joined to the action.

The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed R. Civ. P. 19(b). Indispensability "can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself, viewed through the lens of "equity and good conscience." *Id.* at 109.

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties.

Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said:

> the district court . . . held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion.

Merrill Lynch v. Pimentel, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimentel argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

Accordingly, we must apply the factors set forth in Rule 19(b), in "the context of [this] particular litigation." *Provident Bank,* 390 U.S. at 118. The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf v. Taylor*, 23 U.S. 152, 181, 6 L. Ed. 289 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see*

Montana v. Crow Tribe of Indians, 523 U.S. 696, 707, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944).

Prejudice to the Republic

First, we must consider whether a judgment rendered in the absence of the Republic "might be prejudicial to [it] or to those already parties." Fed. R. Civ. P. 19(b). Following the example of the Supreme Court in conducting this analysis, *see Provident Bank* at 115-16, we consider the circumstances and practicalities of the Republic's claim.

The general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond a three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), a difficult controversy

had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under Rule 19, it is not the sole consideration.

The Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account. *See Provident Bank*, 390 U.S. at 115.

To protect a party as indispensable, Rule 19 requires "an 'interest' that will be impaired by the litigation as a practical matter.'" *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002). As a practical matter, it is doubtful that the Republic has any likelihood of recovering the

Arelma assets. The res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving the assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 19 L. Ed. 2d 936. We do so now.

Scenario one: We dismiss this action. Pimentel sues Merrill Lynch in New York for the assets. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. *See* N.Y. C.P.L.R. § 213. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Pimentel takes the assets to the extent of his judgment. Scenario two: The plaintiff is the Republic. The Republic is time-barred. Pimentel intervenes and obtains the assets.

The Republic insists that it could obtain a judgment regarding the ownership of these assets in the Philippines, where it is relieved of any statute of limitations. But a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect. *See Tchacosh Co. v. Rockwell Int'l*, 766 F.2d 1333, 1336 (9th Cir. 1985); *see also* Restatement (Third) of Foreign Relations § 482(2)(a) (1987).

Finally, we note that any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380,

386, 100 S. Ct. 616, 62 L. Ed. 2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford v. International Harvester Co.*, 668 F.2d 142, 147 (2d Cir. 1981); N.Y. C.P.L.R. § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

The Possibility of Protective Provisions

Rule 19 (b) requires us to assess the opportunity for the court to use "protective provisions in the judgment" by which "the prejudice" to the absent party "can be lessened or avoided." Fed. R. Civ. P. 19(b). Because the Republic has little practical likelihood of obtaining the Arelma asserts, there is no need to lessen prejudice to it.

Adequacy of Judgment and Availability of Alternative Forums

Under Rule 19(b), we are charged with determining whether "a judgment rendered in [the Republic's] absence will be adequate" and "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Fed. R.Civ. P. 19(b). We note the presence in this action of victims of the former president of the Republic. The class represented by Pimentel has secured a judgment against Marcos of almost $2

billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them.

The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. If we dismiss the action for nonjoinder of the Republic, they will have no forum within the Philippines open to their claims. They might sue again within the United States, perhaps in New York, yet such a suit would merely raise the same question of indispensability.

Balancing of the Factors

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimentel and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

The Claims of Arelma and the Philippine National Bank

As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung v. Animal*

Clinic, Inc., 63 Haw. 642, 636 P.2d 721, 723 (Haw. 1981). Accordingly, neither Arelma itself nor the Philippine National Bank as escrow holder now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

The Claims of Roxas and Golden Budha

Roxas was a victim, too. His injury was suffered before the date used to determine the Pimentel class. The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds and in excluding depositions of fact witnesses from his earlier action against Marcos. We do not believe that the district court abused its discretion in either ruling. The expert failed to produce the report required by Fed. R. Civ. P. 26(a)(2), and the district court acted within its discretion in excluding his testimony. *See Yeti by Molly, Ltd. v. Deckers Outdoor Co.*, 259 F.3d 1101, 1105-06 (9th Cir. 2001). As for the depositions, they were excludable as hearsay because the cross examination in the prior proceeding was not undertaken by a party with a "similar motive to develop the testimony." Fed. R. Evid. 804(b)(1). We agree with the district court that the record does not support a finding that the Arelma assets were stolen from Roxas.

As the district court held, Roxas' tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed May 4, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1s W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,
Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,
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MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated;,
Defendant-Appellee,

PHILIPPINE NATIONAL BANK,
Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS, a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF)
FERDINAND E. MARCOS; IMELDA R. MARCOS;)
FERDINAND R. MARCOS, JR.; MARIA IMELDA)
MARCOS; IRENE MARCOS ARANETA; FRONTIER)
RISK CAPITAL MANAGEMENT, L.C.C., a limited)
liability company organized and existing under the laws)
of the State of Nevada, with a registered office at 6100)
Neil Road, Suite 500, Reno, NV. 89511 and an address)
at 300 Wacker Drive, Suite 900, Chicago, IL 60606;)
GROSVENOR CAPITAL LTD., a company organized)
and existing under the law of the United Kingdom, with)
an address at Grosvenor Gardens House, Suite 117,)
35-37 Grosvenor Gardens, London SW1 W OBS, United)
Kingdom; THE ESTATE OF ROGER ROXAS;)
GOLDEN BUDHA CORPORATION, a corporation)
organized and existing under the laws of the State of)
Georgia, with a registered office at 710 West First Street,)
Blue Ridge, Georgia 30513, and a mailing address at 260)
Carrollton St., Buchanan, GA 30113; PHILIPPINE)
NATIONAL BANK,)
Defendants,)

and)
)
MARIANO J. PIMENTAL, on behalf of himself and all)
other persons similarly situated,)
Defendant-Appellee,)
)
REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL)
COMMISSION ON GOOD GOVERNMENT, a)
government agency of the Republic of the Philippines,)
Defendants-Appellants.)
)

MERRILL LYNCH, PIERCE, FENNER AND SMITH,)
INCORPORATED, a corporation organized and existing)
under the laws of the State of Delaware with its principal)
place of business in New York, New York,)
Plaintiff-Appellee,)
)
v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS, a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE)
OF FERDINAND E. MARCOS; IMELDA R.)
MARCOS; FERDINAND R. MARCOS, JR.; MARIA)
IMELDA MARCOS; IRENE MARCOS ARANETA;)

FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Manuel L. Real, District Judge, Presiding

Before: John T. Noonan, Sidyney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

SUMMARY

Civil Litigation and Procedure/Parties - Interpleader

The court of appeals affirmed a judgment of the district court. The court held that the Republic of the Philippines was not an indispensable party under Federal Rule of Civil Procedure 19(b) in an interpleader action concerning the assets of a bank account established by a former president of the Republic.

Appellee Merrill, Lynch, Pierce, Fenner and Smith, Inc., the custodian of the assets of appellant Arelma, S.A. (Arelma), began an interpleader action in district court in Hawaii in 2000. The Merrill Lynch account was found by the district court to have been established in 1992 by a deposit of $2 million by Ferdinand E. Marcos, then the president of appellant the Republic of the Philippines. The shares of Arelma, a Panamanian "shell" corporation, were held in escrow by appellant the Philippine National Bank, pending an ownership determination by the Philippine courts. The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. On appeal in 2002, the court of appeals ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable; the court of appeals stayed the action. The district court dissolved the stay and awarded all the Arelma assets to a class of human rights victims–represented by

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

appellee Mariano Pimental–who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion.

The Republic appealed, maintaining that it was an indispensable party inasmuch as the Republic asserted that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic.

[1] The first section of Rule 19 speaks of persons needed for just adjudication. The Republic fell within this section because the Republic claimed an interest relating to the subject of the action and was so situated that the disposition of the action in its absence might as a practical matter impair or impede its ability to protect that interest. Whenever joinder is not feasible, a court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. [2] The court of appeals' determination in 2002 that the Republic was a necessary party appeared to mean that for a just disposition of the assets it was necessary that the Republic participate. Only if equity and good conscience require it is a necessary party also indispensable.

[3] First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. When the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration. [4] Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since 1988. As

an equitable consideration, the Republic's failure to secure a judgment affecting the assets was a factor to be taken into account. [5] Third, the presence in this action of victims of the former president of the Republic had to be noted. The symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it would have monetary meaning for the poor among them. [6] A final consideration: the res was in the United States. It could not be finally disposed of except by the judgment of a court in the United States. [7] In terms of the factors set out by Rule 19(b) as included among those "to be considered," the Republic would not be prejudiced because it had no practical likelihood of obtaining the Arelma assets and so there was no need of lessening prejudice to it; judgment rendered in its absence would be adequate. [8] Neither Arelma itself nor the Philippine National Bank had an interest to be protected. Merrill Lynch risked being sued again, but it indicated no dissatisfaction with the judgment. The judgment of the district court had to be affirmed.

COUNSEL

Stephen V. Bomse, San Francisco, California, for Republic of the Philippines.

Jay R. Ziegler, Los Angeles, California, for Arelma, Inc. and Philippine National Bank.

Daniel C. Cathcart, Los Angeles, California, for defendants-appellants Golden Budha Corp. and Estate of Roxas.

Robert A. Swift, Philadelphia, Pennsylvania, for defendant-appellee Mariano J. Pimental.

OPINION

NOONAN, Circuit Judge:

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimental (Pimental). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Fed. R. Civ. P. 19(b). We affirm the judgment of the district court as modified below.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000 by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1992 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143, 1149-52 (9th Cir. 2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. *See* An Act Declaring Forfeiture in

Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the Philippines*, 309 F.3d at 1153.

Pimental is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 103 F.3d 767 (9th Cir. 1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas v. Marcos*, 89 Haw. 91, 969 P.2d 1209 (Haw. 1998). The Hawai'i Supreme Court has allowed Roxas'

judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

[1] The case is governed by Fed. R. Civ. P. 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest." Such a party should be joined to the action. Rule 19(a). The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a

judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder." Rule 19(b).

[2] We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Indispensability "can only be determined in the context of particular litigation." *Provident Bank v. Patterson*, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself: equity and good conscience. *Id.* at 109. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said: "the district court . . . held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion." *Merrill Lynch v. Pimental*, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimental argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

The phrase "equity and good conscience" in our judicial usage is coterminous with the first opinions of the United States Supreme Court. *See Hollingsworth v.* Ogle, 1 U.S. 257 (1788). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see, Montana v. Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness and the moral weighing that should attend the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944).

[3] What do equity and good conscience now require here? First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond the three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads v. United*

States, 209 F.3d 1164 (9th Cir. 2000) a difficult controversy had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration.

[4] Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.

Any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 386, 100 S. Ct. 616, 62

L. Ed. 2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford v. International Harvester Co.*, 668 F.2d 142, 147 (2d Cir. 1981); NY CPLR § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

[5] Third, we note the presence in this action of victims of the former president of the Republic. The class represented by Pimental has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them. The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?

Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of damages that has been affirmed on appeal. *Roxas v. Marcos*, 109 Hawai'i 83, 123 P.3d 208 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that the assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

[6] A final consideration: the res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 19 L. Ed. 2d 936. We do so now:

Scenario one: We dismiss this action. Roxas sues Merrill Lynch in New York for the assets asserting conversion. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Roxas takes the assets to the extent of his judgment. Scenario two: The same, except the successful plaintiff in New York is Pimental. Scenario three: The plaintiff is the Republic. The Republic is time-barred. Pimental and Roxas intervene and obtain their proportionate share of the assets.

Realistically, we cannot envisage a lawsuit in which the Republic will prevail.

[7] In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimental and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

[8] As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (Haw. 1981). Accordingly, neither Arelma itself nor the Philippine National Bank now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

Accordingly, we AFFIRM the judgment of the district court, modified to allot to Roxas a share of the assets no greater than that of any class member.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF HAWAI`I

NO. 24605

[Filed November 29, 20

ESTATE OF ROGER ROXAS,	)
	)
and	)
	)
GOLDEN BUDHA CORPORATION,	)
Plaintiffs-Appellants/Cross-Appellees,	)
	)
vs.	)
	)
IMELDA MARCOS,	)
Defendant-Appellee/Cross-Appellant,	)
	)
and	)
	)
FERDINAND MARCOS,	)
Defendant.	)
	)

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(Civ. No. 88-0522)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and Circuit Judge Alm, in place of Acoba, J., recused.)

The plaintiffs-appellants/cross-appellees the Estate of Roger Roxas and the Golden Budha Corporation (GBC) [collectively, hereinafter, "the Appellants"] appeal from, and the defendant-appellee/cross-appellant Imelda Marcos [hereinafter, "Imelda"] cross-appeals from, the fourth amended judgment, filed on September 6, 2001, of the circuit court of the first circuit, the Honorable Marie N. Milks presiding.

On appeal, the Appellants contend that the circuit court erred in: (1) its determination of the "reasonable period of time" during which the highest daily price of gold would fix the proper amount of damages [hereinafter, "reasonable period"]; and (2) denying the Appellants' motion to grant relief pursuant to Hawai`i Rules of Civil Procedure (HRCP) Rule 60(b) by including as defendants Imelda and Ferdinand Marcos II, as personal representatives of the Estate of Ferdinand Marcos.

Imelda alleges in her cross-appeal that the circuit court erred in: (1) "conclud[ing] that a reasonable investor with adequate funds would have waited until nearly four years after the . . . conversion to replace the converted gold"; and (2) "finding . . . that '[f]rom April 5, 1971 until November 19, 1974, there was no continuous period of 30 days that Roxas was not in fear for his safety, in custody, or in hiding.'"

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the September 6, 2001 fourth amended judgment of the circuit court for the following reasons:

(1) When calculating the reasonable period, the fact-finder should consider the hypothetical behavior of a "reasonable investor" in the context of the surrounding fact constellation. *See Taylor v. Smith, Barney & Co.*, 358 F. Supp. 892, 895 & n.8 (D. Utah 1973).

(2) Inasmuch as the record contains substantial evidence that between May 18, 1971 and November 19, 1974 (thirty days before the end of the circuit court's reasonable period), Roxas was arrested, detained, threatened, and tortured, *see Roxas v. Marcos*, 89 Hawai`i 91, 103-04, 969 P.2d 1209, 1221-22 (1998) [hereinafter, "*Roxas I*"], the circuit court did not clearly err in finding that Roxas was "in fear for his safety, in custody, or in hiding" -- and consequently unable to cover his loss -- for more than thirty days after the raid.

(3) Notwithstanding the much shorter reasonable periods that other courts have applied to conversions of securities, the present matter involved a treasure that was so unique in value and appearance that such prior case law is inapplicable. Consequently, the circuit court did not clearly err in determining the endpoint of the reasonable period.

(4) Inasmuch as Roxas's inability to file suit for fifteen years is attributable, at least in part, to Ferdinand Marcos's constitutional immunity, *see Roxas I*, 89 Hawai`i at 129, 969 P.2d at 1247, and does not necessarily imply Roxas's inability to enter the gold market for fifteen years, the circuit court did not clearly err in establishing a reasonable period ending before 1986.

(5) Notwithstanding the Appellants' argument that certain witnesses' "opinions and probable estimates pertaining to the quantity, quality, and/or purity of the gold" would have produced a fairer measure of damages than the New York

rule, the Appellants do not indicate where in the record such testimony can be found. Therefore, they have waived this point of error by failing to provide citations to the record pursuant to Hawai`i Rules of Appellate Procedure Rule 28(b)(7).

(6) Insofar as this court: (a) held in *Roxas I* that judgment could not properly lie against Ferdinand's Estate, nor against Ferdinand himself, 89 Hawai`i at 123, 969 P.2d at 1241; and (b) instructed the circuit court to "hold Imelda personally liable, at least to the extent of her interest in the assets of the . . . Estate [of Ferdinand], for the amount of the . . . judgment against Ferdinand," the circuit court's fourth amended judgment followed this court's mandate precisely. No relief pursuant to Hawai`i Rules of Civil Procedure Rule 60(b) was warranted. Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai`i, November 29, 2005.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CASE NO. CV00-595-R

[Filed July 12, 2004]

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Plaintiff,	)
vs.	)
ARELMA, INC., et al., Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before this Court, sitting without a jury, February 23, 2004, and the Court, having heard and considered the evidence, both oral and documentary, any stipulations of the parties, and the argument of counsel, finds the facts and states the conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure as follows:

FINDINGS OF FACT

1. Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch) is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York.

2. Claimant Arelma S.A., named herein as Arelma, Inc. (Arelma) is a corporation organized under the laws of Panama in 1972 by Ferdinand E. Marcos, and at all times has been and is now a corporation in good standing under Panamanian law. No stock was issued in Arelma S.A. upon its formation. Ferdinand E. Marcos was the sole owner of Arelma S.A..

3. Claimant Philippine National Bank (PNB) is a commercial banking corporation organized under the laws of the Republic of the Philippines with its principal place of business in Metro Manila, Philippines and with a Hawaii-licensed foreign bank agency maintaining an office in Honolulu, Hawaii.

4. Claimant Mariano J, Pimentel (Pimentel) is a citizen of the Republic of the Philippines, residing in Honolulu, Hawaii, and is a member of the plaintiff class that obtained a judgment in the total sum of nearly two billion dollars on February 3, 1995 against the Estate of Ferdinand E. Marcos (Marcos Estate) in the legal action entitled "In Re Estate of Ferdinand E. Marcos, Human Rights Litigation," MDL No. 840 (the Human Rights Victims' Judgment). On May 26, 1995 in the same legal action a contempt order was entered against Imelda R. Marcos and Ferdinand R. Marcos, Jr., which included a fine in the amount of $100,000 per day.

5. Defendant Estate of Roger Roxas (Roxas), whose personal representative is Felix Dacanay, a resident of Florida, and defendant Golden Budha Corporation (Golden Budha), a corporation organized under the laws of the State of

Georgia, (collectively Roxas/Golden Budha) obtained a judgment, entered *nunc pro tunc* as of October 21, 1996, against Imelda Marcos, in her personal capacity to the extent of her interest in the Marcos Estate, in the sum of $19,275,848.37, plus taxable costs of $61,074.54 (the Roxas/Golden Budha Judgment).

6. All other named claimants have defaulted, have disclaimed any interest in the subject matter of this interpleader or have been dismissed by the Court, other than defendants ENC Corporation, John K. Burns and Frontier Risk Capital Management, LLC, each of whom filed Answers to the Complaint on file herein, but did not appear at trial. There is no evidence in support of any claim of those three defendants to the interpleaded assets.

7. Ferdinand E. Marcos served as president of the Philippines from 1965 until February 1986. (Jt. Pretrial Stip.) He was the de jure government of the Republic of the Philippines during his term in office.

8. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii on September 29, 1989. (Jt. Pretrial Stip.)

9. In 1972 Jean Louis Sunier, a Swiss banker, recommended to Ferdinand E. Marcos, through Marcos' friend Jose Campos, that Marcos set up a securities trading account in the United States. (Ex. 2)

10. The creation of Arelma in September 1972 coincided with Ferdinand E. Marcos' declaration of martial law in the Philippines. (Ex. 40)

11. During martial law, Marcos increased his individual power so that he could personally govern and direct the operation of the entire government. (Ex. 33 and 40) By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. (Ex. 34 and 40) Thousands were subjected to hideous tortures. Thousands more were summarily executed and others simply "disappeared." (Ex. 35 and 40)

12. The Swiss banker recommended that the account be in the name of a Panamanian corporation called Arelma, Inc. which he caused to be formed in Panama in September 1972. (Ex. 2)

13. A securities account No. 165-07312, was established at Merrill Lynch in New York by Arelma in 1972. (Jt. Pretrial Stip.) On the account opening form, Merrill Lynch listed the Arelma entity as a "holding company." (Ex. 6)

14. The account of Merrill Lynch was funded by Arelma with a deposit of $2,000,000 in 1972. (Jt. Pretrial Stip.; Ex. 8 and 9; Sunier Dep. 60) The source of those funds was Ferdinand E. Marcos.

15. The property which is the subject of this interpleader, is the assets which were held in a securities account No. 165-07312 at Merrill Lynch in the name of Arelma. (Jt. Pretrial Stip.)

16. Merrill Lynch deposited the entire assets in account No. 165-07312, approximately $35 million, with the Clerk of the Court in Federal Court in Hawaii after Merrill Lynch filed this action in interpleader. (Jt. Pretrial Stip.; Ex. 32) Merrill Lynch makes no claim to ownership of Arelma assets.

17. The only share certificates in Arelma were issued in 1981 (9 years after its formation) when two bearer share certificates for 50 shares each were issued "in blank," meaning no name was inserted on the share certificates. Jean Louis Sunier, an officer of Swiss Bank corporation until 1983 and an officer and director of Suntrust Investment Co. thereafter, maintained possession and custody of the share certificates in trust for Ferdinand E. Marcos from 1981 until he surrendered them to the Swiss government as directed by that government in 2000. (Jt. Pretrial Stip.; Sunier Dep. 67) No Swiss court determined the ownership of the share certificates.

18. Arelma had the same officers, Messrs Sunier and Barbey who were Swiss Bank Corporation employees, until 1981 when the Bank required its employees to resign as officers of corporations whose financial affairs it managed. In 1983 Mr. Sunier arranged for three of his personal lawyers to be elected the new officers in a meeting held in his office at the Bank. Until 2000 these officers never changed and the officers never took any actions on behalf of Arelma. (Sunier Dep. 69; Ex. 19 and 29)

19. In early communications to the owner, Sunier used the euphemism of "friend" or "friends" when referring to Marcos. (Ex. 2, 13 and 14) In a letter dated May 19, 1983, to the account holder addressed "Dear Excellency" and containing the code word "Sapphire", Mr. Sunier gave the current account balance. (Sunier Dep. 86) Sunier also explained his change of Arelma officers but assured the account holder that "I keep on controlling all operations for the companies." The reference to "Excellency" is to Fedinand E. Marcos. (Ex. 19)

20. From its inception, Arelma had articles of incorporation (or corporate constitution) but no corporate by-laws. The articles of incorporation required the shareholders to hold an annual meeting and to elect directors annually. (Ex. 46)

21. Arelma never held an annual shareholder meeting; and only held director meetings on two occasions over 28 years to change officers and directors and to issue the two stock certificates. (Sunier Dep. 87 and 89; Ex. 29)

22. Other than the two meetings of board members, Arelma has no minutes of director meetings prior to 2000. (Sunier Dep. 89)

23. Arelma never had any employees. (Sunier Dep. 90)

24. Arelma never had an accountant and never paid any income or corporate taxes. (Sunier Dep. 90)

25. Arelma never had standard financial statements, such as a balance sheet or profit and loss statement. (Sunier Dep. 90)

26. Arelma never had any assets except for the Merrill Lynch account and a small account at Swiss Bank Corporation. (Sunier Dep. 92)

27. Arelma never maintained an office or place of business, and used a Swiss address (Swiss Bank Corporation and later Suntrust) as an address for mail. (Ex. 10, 21)

28. Arelma never paid taxes to any taxing authority other than Panama, and that related solely to the fee for Arelma's continued incorporation. After 1983 these were paid by

Suntrust for which it was reimbursed by transfers from Arelma's account at Merrill Lynch. (Ex. 25, 26, 30)

29. In 1987 a New York Federal court in the case of *Republic of the Philippines v. Ferdinand E. Marcos* froze the Arelma account at Merrill Lynch. (Ex. 23; Sunier Dep. 81) No claim of sovereign immunity was made in that case freezing the Arelma account.

30. The Swiss Federal Supreme Court has twice held that Ferdinand E. Marcos controlled Arelma and that Marcos had the power of disposition over Arelma. Arelma was a party in both proceedings and represented by legal counsel. (Ex. 47 at A14 and Ex.48 at C17)

31. 1997 Imelda Marcos engaged John Burns, a banker, to try and recover the assets in the Merrill Lynch account on behalf of the Estate of Ferdinand E. Marcos. Imelda Marcos and Ferdinand R. Marcos, as executors of his Estate, executed powers of attorney to Burns for this purpose, and he made a demand on Merrill Lynch to release the assets. (Burns Dep. 21-23; Ex. 28 and 29)

32. Sunier's power of attorney expressly included the duty to appear and act on behalf of Arelma in legal proceedings. (Ex. 46) In 1997 Sunier acknowledged in a signed statement to Swiss authorities that the formation of Arelma in September 1972 was part of a new relationship with Ferdinand Marcos. He acknowledged that he held the Arelma share certificates and was the only person in contact with the Marcos family. (Ex. 29)

33. Suntrust and Sunier have admitted that Arelma was incorporated to receive funds owned by Ferdinand Marcos, and that Marcos controlled Arelma during his lifetime. (Ex.

44; Sunier Dep. 46-47) Upon Marcos death that control passed to his Estate.

34. The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead. (Pimentel Dep. 84-85 and 93-94)

35. The class of Filipino Judgment Creditors in MDL No. 840 has a Final Judgment entered February 3, 1995 against the Estate of Ferdinand E. Marcos in the principal amount of $1,964,005,859.90 plus interest at the rate allowed by 28 U.S.C. § 1961 which has not been satisfied. (Jt. Pretrial Stip.)

36. The class of Filipino Judgment Creditors in MDL No. 840 has a contempt award against Imelda R. Marcos and Ferdinand R. Marcos, personally, in the amount of $100,000 per day which had been running since June 30, 1995, and which has not been satisfied. (Jt. Pretrial Stip.)

37. Neither Golden Budha Corporation nor Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against the Estate of Ferdinand E. Marcos. (Jt. Pretrial Stip.)

38. Golden Budha Corporation has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $13,275,848.37 as of October 21, 1996. (Jt.

Pretrial Stip.) This claim, if any, is junior to the claim of the class of Filipino Judgment Creditors in MDL No. 840.

39. Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $6 million as of October 21, 1996. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840.

40. PNB, as an escrow agent, holds the two bearer share certificates owned by the Estate of Ferdinand E. Marcos, issued by Arelma pursuant to an Escrow Agreement dated August 14, 1995 between PNB and the PCGG. (Jt. Pretrial Stip.)

41. The two Arelma bearer share certificates owned by the Estate of Ferdinand E. Marcos were delivered to PNB by the PCGG which obtained them from the Swiss government. (Jt. Pretrial Stip.)

42. Suntrust Investment Co. has disclaimed any interest in the interpleaded assets. (Jt. Pretrial Stip.)

43. Pursuant to the Swiss Closing Order, the Arelma bearer share certificates were subsequently returned to the Philippines and since on or about July 28, 2000, have been in the possession of and held by PNB, as escrow holder, according to the Arelma Escrow Agreement.

44. On or about November 20, 2000, the Board of Directors of Arelma held a special meeting at which the Board of Directors granted a general power of attorney in favor of PNB to represent Arelma in seeking the transfer of the assets

in the Arelma Account to PNB as escrow holder. (Trial Exhibits 125 and 136) There is no evidence that the Board of Directors was duly elected and acting for Arelma S.A. owned by Ferdinand Marcos.

CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. §2361 interpleader is a hybrid civil action in which there is no defendant upon whom liability can be claimed. There are only claimants invited, not summoned, to make a claim against the interpleaded fund.

2. This Court has jurisdiction pursuant to 28 U.S.C. §1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. §1655 and the doctrines of *quasi in rein and in rem* jurisdiction. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of the Court.

3. Venue is based upon 28 U.S.C. §1397 since two of the claimants, Pimentel and PNB reside in Hawaii.

4. Arelma was properly served pursuant to FRCP Rule 4(k)(1)(C) which provides for nationwide service of process: "Service of summons is effective to establish jurisdiction over the person of a defendant [claimant] ... who is subject to the Federal interpleader jurisdiction under 28 U.S.C. §1335..." *See Rubinbaum v. Related Corporate Partners V,* 154 F.Supp.2d 481,486 (SDNY 2001).

5. Minimum jurisdiction contacts are satisfied for purposes of personal jurisdiction over Arelma, Inc. since it had a muli-million dollar trading account at Merrill Lynch in New York

between 1972 and 2000. *See SIPC v. Vigman,* 764 F.2d 1309, 1315-16 (9th Cir. 1985).

6. Because this Court has Federal subject matter jurisdiction based on the Federal Interpleader Statute, 28 U.S.C. §1335, and *in rem* jurisdiction under 28 U.S.C. §1655, federal substantive law applies, although a Federal court may look to state law for guidance. *Board of Trustees v. Valley Cabinet & Mfg. Co.,* 877 F.2d 769, 772 (9th Cir. 1989). In this case, New York has the most significant contacts to the interpleaded assets.

7. It would be contrary to the public policy of the United States to apply the law of Panama when, based on Arelma's contention, Panamanian law precludes use of the *alter ego* doctrine among private parties. See *First National City Bank v. Banco Para el Comercio Exterior,* 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result." [citations and footnotes omitted]); *Itel Containers International Corp. v. Atlanttrafik Express Service Ltd.,* 1988 U.S.Dist. LEXIS 7051 at 12 (S.D.N.Y. 1988); *Marlowe v. Argentine Naval Commission,* 604 F.Supp 703, 705 (D.D.C. 1985); *Edwards v. Schillinger,* 245 Ill. 231, 91

N.E. 1048, 1053 (1910) (term "internal affairs" does not extend to cheating creditors, but must be confined to relations affecting only stockholders and corporation among themselves).

8. Under federal common law, a corporation's veil may be pierced based upon three factors:

a) the amount of respect given to the separate identity of the corporation by its shareholders;
b) the degree of injustice visited upon the litigants by recognition of the corporate entity; and
(c) the fraudulent intent of the incorporators.

Board of Trustees v. Valley Cabinet & Mfg. Co., supra. For a party to prevail, he must satisfy the first prong and either the second or third prong. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (92 Cir.), *cert. denied*, 133 L.Ed.2d 203 (1995). Piercing of the corporate veil is an equitable remedy addressed to the discretion of the court. *McClaran v. Plastic Industries, Inc.*, 97 F.3d 347 (9th Cir. 1996). The law of New York is similar to Federal law on this subject. See *Goya Foods, Inc. v. Unanue,* 233 F.3d 38, 43 (1st Cir. 2000) (applying New York law). New York law, like Federal law, permits "reverse piercing" of the corporate veil. *Id.*

9. PNB, as escrow agent for the parties claiming ownership of the Arelma share certificates, lacks standing to seek ownership of the proceeds of the Merrill Lynch account which was maintained in the name of Arelma, Inc. See *Dole Food Co. v. Patrickson,* 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of ownership of shares, does

not own the corporation's assets..."). Moreover, Arelma itself is a party actively seeking control of the assets at issue.

10. Arelma and PNB are collaterally estopped from denying or opposing the findings of the Swiss Federal Supreme Court that Ferdinand Marcos controlled Arelma. (Lebrecht Dep. 27-31)

11. The Marcoses had a highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods, including aliases and shell corporations. See *Hilao v. Estate of Ferdinand Marcos,* 25 F.3d 1467, 1480 (9th Cir. 1994); *Republic of the Philippines v. Marcos,* 862 F.2d 1355 (9th Cir. 1988); and *Republic of the Philippines v. Marcos,* 806 F.2d 344 (2nd Cir. 1986).

12. The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos.

13. Arelma was controlled by Ferdinand E. Marcos or his representatives during his lifetime.

14. Arelma served no legitimate purpose other than to hide the assets of Ferdinand E. Marcos.

15. There was complete disregard of Arelma's corporate identity by everyone who dealt with Arelma's business.

16. The sole deposit of $2 million into Arelma's Merrill Lynch account in November 1972 coincided with Marcos' declaration of martial law and the inception of massive *jus cogens* human rights abuses for which Marcos was responsible.

17. A Class of 9,539 human rights victims (or their heirs) have a final judgment against the Estate of Ferdinand E. Marcos for almost $2 billion, plus interest.

18. It would be unjust to prevent the Class of persons tortured, summarily executed and disappeared from receiving the proceeds of the Arelma account at Merrill Lynch to partially satisfy their judgment.

19. Golden Budha and Estate of Roxas have not proved that the assets in the Merrill Lynch account derived from assets allegedly stolen from them.

20. The judgments of Golden Budha and Estate of Roxas are against Imelda Marcos, not Ferdinand E. Marcos or his Estate.

21. Arelma cannot recover the proceeds of the account at Merrill Lynch since it was the *alter ego* and instrumentality of Ferdinand E. Marcos, and its claim is subordinate to the claim of the Class as judgment creditors of the Estate of Marcos.

22. Pimentel and the Class of Human Rights victims are entitled to the entirety of the interpleaded assets, and the Clerk of the Court is directed to transfer those assets to the account in the Clerk's Office established in MDL No. 840 pursuant to paragraph 10 of the Final Judgment of February 3, 1995 in that action.

DATED: July 12, 2004.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 04-16401, NO. 04-16503 and NO. 04-16538

[Filed November 29, 2004]

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, Plaintiff.	)
vs.	)
ARELMA INC., et al., Defendants	)
The Golden Budha Corporation and Estate of Roger Roxas, Defendant-Appellants	)

Consolidated Appeals from the United States District Court
For the District of Hawaii
No. CV-00-00595 MLR

OPENING BRIEF OF DEFENDANTS-IN-INTERPLEADER/APPELLANTS THE ESTATE OF ROGER ROXAS AND THE GOLDEN BUDHA CORPORATION

WARD D. JONES
Pauahi Tower - Suite 460
1001 Bishop Street
Honolulu, Hawai'i 96813
Phone: (808) 550-4990
Fax: (808) 550-4991

ALEXANDER T. MacLAREN
Pacific Tower- Suite 2450
1001 Bishop Street
Honolulu, Hawai'i 96813
Phone: (808) 524-5500
Fax: (808) 536-8844

DANIEL C. CATHCART
MAGANA, CATHCART & McCARTHY
1801 Avenue of the Stars - Suite 600
Los Angeles, California 90067-5801
Phone: (310) 553-6630
Fax: (310) 785-9143

Attorneys for Defendants-in-interpleader/Appellants
The Estate of Roger Roxas and The Golden Budha
Corporation

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was entered on July 12, 2004. This appeal on behalf of Golden Budha and Estate of Roxas was timely filed on July 28, 2004.

ISSUES PRESENTED

Appellants Golden Buhda and Estate of Roxas present the following issues for adjudication on appeal:

1. Whether the probate exception precludes federal jurisdiction of this action in which the district court determined the fund to have been the property of the estate, determined priority among claimants to assets of the estate, and ordered distribution of assets of the estate?

2. Whether there exists the requisite adversity between the Pimentel claimants as to the fund and as to the other claimants to warrant jurisdiction of the Pimentel claimants when their claim is against the general assets of the Marcos estate, not the particular fund, while the claims of other claimants are asserted against the particular interpleaded fund?

3. Whether the district court committed prejudicial error when it relieved the prevailing claimant of the burden of establishing entitlement to the interpleaded funds, and instead imposed upon these Appellants the burden of establishing that the prevailing claimants are not entitled to the fund?

4. Whether the district court committed prejudicial error when it excluded the expert testimony of these Appellants' expert for failure to provide an expert report, when no report was required because the expert was not a retained expert and where he was deposed respecting his expert opinions such that there was no surprise and where these Appellants' offer to make him available for further questioning was not

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accepted?

5. Whether the district court committed prejudicial error when it excluded the deposition testimony offered by these Appellants as hearsay, when the depositions constituted prior testimony with respect to which parties with similar motives fully cross-examined the deponents?

6. Whether the district court erred in determining that these Appellants' claim was "junior" to the Pimentel claimants' claim?

7. Whether the district court erred in determining that Ferdinand E. Marcos was the legitimate owner of the interpleaded funds?

8. Whether the district court erred in determining that it would be unjust not to award the interpleaded funds to the Pimentel claimants?

STATEMENT OF THE CASE

This case is an interpleader case initiated by Merrill, Lynch, Pierce, Fenner & Smith ("Merrill Lynch"). Merrill Lynch deposited with the court $35 million dollars which was the product of $2 million deposited with it in 1972, by Arelma, Inc. Named as claimants (nominal defendants) in the case were these Appellants, Golden Budha and Estate of Roxas; Arelma, Inc. ("Arelma"), Philippine National Bank ("PNB"); Mariano J. Pimentel, as representative of a class ("Pimentel claimants"), The Republic of the Philippines and the Presidential Commission on Good Government ("PCGG"). Findings of Fact 2-6 (Excerpt of the Record

(("ER")) pp. 677-678). The latter two parties asserted sovereign immunity and were dismissed. Docket (ER p. 678). No other claimants participated at trial. Trial Trans., cover pages (ER pp. 598-599); Finding of Fact 6 (ER p. 678).

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wealth by use of dummy corporations. Buckley Depo.(ER pp. 89, 91, 94, 116-117).

The State Court Judgment

Roger Roxas and Golden Budha sued Ferdinand Marcos and Imelda Marcos in Hawai'i State Court in February 1988.[2] Ferdinand Marcos died on September 29, 1989. Finding of Fact 8 (ER p. 678). During the course of the action Imelda Marcos was substituted as representative of the Estate of Marcos pursuant to a substitution under Hawai'i Rules of Court Rule 25. *Roxas v. Marcos, supra,* Civil No. 88-052202. *See also,* Trial Trans. (ER p. 632-633). Roger died suddenly on May 25, 1993 on the day set for the commencement of trial. Cathcart Dec., para. 12 (ER p. 536). Judgment in the amount of $43 billion was entered against the Estate of Marcos. *Roxas v. Marcos, supra,* Civil No. 88-0522-02. On appeal, the Hawai'i Supreme Court affirmed the judgment of $6 million in favor of the Estate of Roger Roxas for his imprisonment and torture and ordered a new trial as to the value of the gold buddha and 17 small gold bars. That portion of the case was retried and the trial court determined the value to be slightly in excess of $13

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[2] *Roxas v. Marcos,* Civil No. 88-0522-02, State of Hawaii Circuit Court, First Circuit.

million. The Supreme Court also held that the substitution of Imelda as representative of the Estate was invalid because she had never been formally appointed by a court as administratrix of the estate, although she had been acting in that capacity. *Roxas v. Marcos,* 89 Haw. 91, 969 P.2d 1209, 1240 (1998). Accordingly, the judgment was altered to name Imelda Marcos in her personal capacity to the extent of her interest in the estate. Findings of Fact 38-39 (ER p. 683). Both sides have appealed to the Hawai'i Supreme Court for a second time. The Golden Budha and Estate of Roxas' appeal is based, in part, upon newly

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developed evidence that Imelda was, in fact, appointed administratrix of the Estate of Marcos by a Filipino Court. The appeal is currently pending before the Hawai'i Supreme Court.[3]

This court is requested to take judicial notice of the content of court records in the following 4 actions and the files therein, which bear on the factual and procedural history of this action, as official records capable of ready determination by sources whose accuracy cannot reasonably be questioned, pursuant to Rule 201(b)(2) of the Federal Rules of Evidence, namely: *Roxas v. Marcos,* Civil No. 88-0522-02, State of Hawaii Circuit Court, First Circuit, the action in which Golden Budha and Estate of Roxas obtained their judgment for the theft of the treasure and for the imprisonment and torture of Roger Roxas; *Roxas v. Marcos,* 89 Haw. 91, 969 P.2d 1209 (1998), the original appeal of the *Roxas v. Marcos* case; Hawaii Supreme Court,

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[3] Hawaii Supreme Court, Case No. 24605.

Case No. 24605, the pending appeal of the *Roxas v. Marcos* case; and *Hilao v. Estate ofMarcos,* MDL No. 840 (D.Haw. 1991), *affd* 103 F.3d 762 (1996), the action in which the Pimentel claimants obtained their judgment against the Estate of Marcos. *Paul v. Dade County, Fla.,* 419 F.2d 10, 12 (5th Cir. 1969), *cert den* 397 U.S. 1065 (Court of Appeals could take judicial notice of state action in which plaintiff had previously litigated issues sought to be raised in federal action); *State of Florida v. Charley Toppino & Sons, Inc.,* 514 F.2d 700, 704 (5th Cir. 1975) (district court could take judicial notice of records in related proceedings).

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Basis Of Claimants' Claims Against The Interpleaded Funds

These Appellants, Golden Budha and Estate of Roxas, are holders of the above-described Hawai'i State Court judgment in their favor for theft by Marcos from Roger Roxas of the treasure he discovered. They claim entitlement to the interpleaded funds as the owners of assets stolen and used by Marcos to fund the account. Trial Trans. (ER pp. 628-634).

Arelma is a Panamanian holding corporation, owned by Marcos, which funded the Merrill, Lynch account and in whose name the account was opened. It claims entitlement to the interpleaded funds as the owner of the account. The claim of the PNB is derivative of the Arelma claim. The Bank asserts that it holds the bearer shares of Arelma in escrow, subject to agreement of all parties or a decision of the Philippine Supreme Court, and makes no claim to the assets in its own name. Trial Trans. (ER pp. 613-618, 623-625).

Mariano J. Pimentel is the representative of a class of individuals who obtained a judgment against the Estate of Marcos for various torts committed against them under the Marcos administration.[4] They do not claim ownership of the fund. Their claim is based on their status as judgment creditors of Marcos. Trial Trans. (ER pp. 608-613).

The Republic of the Philippines and the PCGG claim the funds on behalf of the government of the Philippines.

Non-jury Trial

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This matter was heard before Judge Manuel Real. Trial Trans., (ER p. 598). Real is the same judge before whom the Pimentel claimants' underlying case was heard. *Hilao v. Estate of Marcos, supra,* MDL No. 840. The court excluded the testimony of every witness submitted by these Appellants. Trial Trans., (ER pp. 601- 608); Pretrial Order No. 9 (ER p. 55-57).

SUMMARY OF THE ARGUMENT

The district court's order purported to disburse assets which the court itself held to be property of the deceased Ferdinand Marcos. The assets were part of Marcos' estate. There is a well-recognized exception to federal court jurisdiction for probate matters. This matter should properly have been heard in state probate court.

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[4] Hilao v. Estate of Marcos, MDL No. 840 (D.Haw. 1991), *affd* 103 F.3d 762 (1996).

The federal court has no jurisdiction of the Pimentel claimants in this interpleader case because they lack the required adversity as to the interpleaded fund and as to the other parties. A claimant in interpleader must have a claim against the particular interpleaded funds. A general judgment against the holder or owner of a stake does not qualify as a claim against the stake. They assert no prior ownership right to the fund. The Pimentel claim judgment creditor claim against Marcos' assets is not adverse to or inconsistent with the claims of the other claimants who assert ownership rights to the particular fund.

The Pimentel claimants had the burden to prove every element necessary to establish their right to the particular fund and their relative priority as to all other claimants to the interpleaded fund. Inasmuch as the Golden Budha and Estate of Marcos asserted priority based on their assertion that the funds were not the legitimate property of Marcos, but rather were stolen funds or the product of stolen funds, as to

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district court, as discussed below, would have established that Marcos had no legitimate means of acquiring massive wealth (Buckley Depo. (ER p. 63)), that his transferring of assets into dummy corporations was part of a pattern of concealment (Buckley Depo. (ER pp. 89)), that the most likely source of the bulk of his wealth was the Japanese treasure discovered by Roxas (Buckley Depo. (ER pp. 91-99)), and that both he and the PCGG concluded that the money which funded the Arelma account was ill-begotten (Buckley Depo. (ER pp. 111-116)).

The Pimentel claimants were required to prove that the assets that funded the Arelma account, which funded the Merrill Lynch account, were lawfully owned by Marcos both to establish the elements of their entitlement to the specific fund in the Merrill Lynch account and to establish their priority over the claims of the Roxas claimants. They failed to do so and the award must be reversed.

IV. THE DISTRICT COURT'S EXCLUSION OF THE EXPERT TESTIMONY OF JOHN W. BUCKLEY, A FORENSIC ACCOUNTANT, WAS ERRONEOUS AND PREJUDICIAL.

John W. Buckley ("Buckley"), a forensic accountant, was identified as a witness by the Roxas claimants in their Pre-trial Statement.[15] The statement identified Buckley as a forensic accountant and described the scope of his investigation, pursuant to previous employment, and the scope of the opinion testimony he would offer.[16] At the request of counsel for the Pimentel claimants to accommodate his

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[15] Contrary to the representation of counsel for Appellants to the court in its Notice of Hearing on Defendant Pimentel's Motion In Limine, Buckley was not identified as a "fact witness," but as a "witness." *See* Pretrial Statement, (ER p. 23).

[16] The Pretrial Statement recited: "Mr. Buckley is a forensic accountant employed by the PCGG to examine Marcos accounts, records and tax returns. Mr. Buckley will testify that the earnings of Mr. and Mrs. Marcos prior to 1972, and thereafter, would not permit them to lawfully acquire the funds deposited into the Arelma account with Merrill Lynch. He concludes that those funds had to be stolen from others." exh. 9, Buckley Depo. (ER pp. 67-68.)

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travel schedule, Mr. Buckley's deposition was taken on short notice January 17, 2002, more than a year and a half before the pretrial conference. Cathcart Dec., paras. 2-4 (ER p. 34); Buckley Depo. (ER pp. 67-68).

In correspondence dated March 26, 2002, Appellants' counsel wrote to the Pimentel claimants' counsel. He stated his doubts that Buckley was subject to the report requirement and offered, if counsel felt that the Pimentel claimants had been disadvantaged so as not to be able to take a full and complete deposition of Mr. Buckley, to make him available for further examination. Cathcart Dec., para. 7, exh. 3 (ER p. 34). That offer was never accepted.

At the pretrial conference, held on September 29, 2003, the court granted the Pimentel claimants' motion to exclude the testimony of Buckley as an expert witness on the ground that no expert report had been tendered, contrary to Federal Rules of Civil Procedure 26 (a)(2)(A). Buckley would be allowed to testify as a fact witness, "but not [to] the conclusions which he draws." Pretrial Conf. Trans. (ER pp. 44-46); Pretrial Order No. 9 (ER p. 56).

A. John W. Buckley Was Not Required To Submit An Expert Report Under Federal Rules of Civil Procedure 26(a)(2)(A).

Rule 26(a)(2)(B) authorizes certain experts to offer expert testimony at trial without submitting an expert report. The report requirement does not apply to expert opinions concerning information a witness obtains as an actor or viewer rather than as an expert retained to form opinions in anticipation of trial.

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Rule 26(a)(2)(B) provides:

> (B) .... this Disclosure [of expert witnesses] shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report.... (Emphasis added.)

The Advisory Committee on the 1993 amendments to Rule 26[17] noted the limited applicability of the report requirement and offered an example of an expert who would not be required to report. They wrote:

> The requirement of a written report in Paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement of a written report.

The court in *Brown v. Best Foods,* 169 F.R.D. 385 (N.D. Ala. 1996) summarized the import of the rule:

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[17] The pre-1993 version of Rule 26 excepted those who formed their opinions not in preparation for trial, but as actors or viewers. The post-1993 version excepts those who are not retained or specially employed. The rules express the same standard. The reasoning of courts under the earlier version of the Rule remains valid. *Zurba v. United States,* 202 F.R.D. 590, 592 (N.D. Ill. 2001).

> "Rule 26(b)(4) [footnote omitted] anticipates that not all expert witnesses will prepare reports, and allows the taking of depositions of non-reporting experts." [citations omitted] In other words, "[e]very witness offering testimony under the Federal Rules of Evidence 702, 703 and 705 is not 'retained' or 'specially employed' to provide expert testimony," [citation omitted] and therefore Rule 26(a)(2)(B) does not require all expert witnesses to prepare and sign a written report, but does allow a defendant to take this person's deposition.
> Brown v. Best Foods, supra, 169 F.R.D. at 387.

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The report requirement does not apply to Mr. Buckley, whose opinions were formed in the course of other employment long before this action, and who was not retained by the Roxas claimants to form opinions in anticipation of this case. As was developed in his deposition and was recited to the District Court in argument on the motion to exclude, Mr. Buckley is a forensic accountant who was hired by the PCGG for about a year in 1988 or 1989, more than ten years before this lawsuit was filed, to examine documents relating to Ferdinand Marcos' assets and create a document that could be used by the PCGG to pursue those assets. He reviewed massive numbers of financial records, including earnings statements and assets statements of Marcos and his family. Buckley Depo. (ER pp. 79-84, 106). When he came across organizations or people or bank account numbers or money transfers he entered them into a database from which he produced a compendium of leads for further investigation. Buckley Depo. (ER p. 63).

Under Rule 26 a witness is not subject to the expert report provision if(1) his expert opinion is based on observations made during the course of his employment; (2) the opinion was not "acquired or developed in anticipation of litigation or for trial;" and (3) the opinion is based on the personal observations of the witness. *Brown v. Best Foods, supra,* 169 F.R.D. at 387; *Zurba v. United States,* 202 F.R.D. 590, 592 (N.D. Ill. 2001). The law concerning experts who are excused from the report requirement has been developed largely in the context of treating physicians. So long as treating physicians acquire their opinions through treatment of a patient, rather than in preparation for trial, they may state their opinions and inferences without becoming retained experts and cannot be forced to file the written reports required under Rule

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26(a)(2)(B). *Washington v. Arapahoe County Dept. of Soc. Services,* 197 F.R.D. 439, 442 (D. Colo. 2000); *Brown v. Best Foods,* 169 F.R.D. 385, 387 (N.D. Ala. 1996); *Salas v. United States,* 165 F.R.D. 31, 33 (W.D.N.Y. 1995).

In considering the scope of expert testimony a doctor may offer without becoming a retained expert, one court noted that, "[D]octors do not operate in a vacuum. In order to properly treat and diagnose a patient, a doctor needs to know, establish, or reach a conclusion regarding the cause of the patient's injury." *McCloughan v. City of Springfield,* 208 F.R.D. 236, 242 (C.D. Ill. 2002). Included within the permissible opinion of a treating physician are causation of the injuries, diagnosis of the injuries, and prognoses regarding future disability. *Salas v. United States, supra,* 165 F.R.D. at 33-34; *Kirkland v. Union Pacific Railroad,* 189 F.R.D. 605, 608 (D. Nev. 1999).

The exception for non-reporting experts is not limited to treating physicians. Rule 26 itself describes non-reporting experts as those who are not retained or specially employed, without qualification. The Note of the Advisory Board cites a treating physician only as an "example" of an expert who may testify at trial without a written report. Indeed, the report exception has been applied to firemen as well. In *Brandt Distributing Co. v. Federal Ins. Co.*, 247 F.3d 822 (8th Cir. 2001), the court held that there was no violation of Rule 26(a)(2) when a fire captain who had not provided an expert report testified at trial to his opinion regarding the fire because he conducted his investigation and prepared his report in the course of his employment with the fire department, not on behalf of a party. *Id.* at 826.

Like the treating physicians and the fire captain, Buckley was not a retained

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expert, but an actor or viewer due to his independent employment which was not in anticipation of litigation. He was employed by PCGG to conduct an investigation years before this lawsuit commenced. The opinions he formed during the course of that employment long ago were not developed for this lawsuit. His opinion that the source of Marcos assets was from looting was set forth in documentation that he prepared his employment with the PCGG and was based on his personal observation of thousands of the Marcos' financial documents as an actor in the PCGG's investigation. Clearly, his conclusions were not reached at the behest of counsel for the Roxas claimants in anticipation of this lawsuit. He was not hired by them to conduct any investigation, to prepare any report or to form any new opinions for this litigation.

The scope of Mr. Buckley's opinion testimony that Marcos' assets were stolen and the most probable source of the money with which Marcos funded the Merrill Lynch account was the Japanese treasure is within the permissible scope of a non-reporting expert. In *Brandt Distributing Co., Inc. v. Federal Ins. Co.*, 247 F.3d 822 (8th Cir. 2001) the fire captain testified that the fire was set for fraudulent purposes. The court noted:

> His testimony reflected the circumstances weighed against other possible reasons for an arson fire, such as a random act of vandalism or an act of revenge. Captain Gronemeyer's testimony was a logical inference from his report.
> *Id.* at 826.

The court concluded that the captain, who testified on behalf of the insurance company, was not a retained expert. No report was required, *Id.* As a doctor looks to the cause of injuries he treats and a fireman to the cause of fires he fights, a forensic

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account looks to the source of funds he investigates. His testimony weighing and evaluating the possible sources of Marcos' assets was a logical inference from his employment.

Mr. Buckley's status as a non-reporting expert fits the persuasive rationale offered by one court for not requiring written reports from unretained experts.

> The unretained experts, who formed opinions from pre-litigation observation, invariably have files from

> which any competent trail attorney can effectively cross-examine. The retained expert... has no such files, and is thus required to provide the report to enable effective cross examination. This reading puts unretained experts, because of their historical file, and retained experts, because of the required report, on equal footing for cross-examination purposes. *Sprague v. Liberty Mutual Ins. Co.,* 177 F.R.D. 78, 81 (D. N.H. 1998).

Mr. Buckley did have historical documentation of his investigation, on which he compiled data and documented his opinions as he reached them. Pertinent pages of that compendium were produced at the deposition and used by counsel to conduct cross-examination.[18] Buckley Depo. (ER pp. 68-70, 76-87).

Paying an expert witness to attend a deposition or testify in court, to write a summarizing letter or to review notes prior to testifying does not amount to retaining a witness as an expert. *Hall v. Sykes,* 165 F.R.D. 46, 48-49 (E.D. Va. 1995). Buckley was first called by counsel for the Roxas claimants about a week before the deposition. In preparation for the deposition he located a copy of his compendium and spent half an hour on the day of the deposition reviewing a few documents which he had seen before or prepared himself. Buckley Depo. ER p. 105). He testified that

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[18] The compendium produced at Buckley's deposition set forth his conclusion that the money that funded Arelma's account at Merrill Lynch was derived from at least $20 million of "looted" money that was placed in a Mahler Foundation or Establishment account in Switzer land by Marcos using an alias. Buckley Depo. (ER pp. 80-81).

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he would charge for "whatever time I spent preparing for it [the deposition], which was very little." Buckley Depo. (ER pp. 91, 106).

Mr. Buckley was not a retained expert. No expert report was required of him, and the district court erred in excluding his testimony for failure to provide a report.

B. Even Had A Report Been Required Of Mr. Buckley, The Court Abused Its Discretion And Violated Rule 37 By Excluding The Expert Testimony Because The Failure To Provide A Report Was Neither Unjustified Nor Harmful.

Federal Rules of Civil Procedure Rule 37, which sets forth sanctions for failure to provide discovery, provides that no sanction should be imposed if there was substantial justification for the non-disclosure, or if the non-disclosure was harmless.

Rule 37(c)(1) states:

> A party that without substantial justification fails to disclose information required by Rule 26(a)... is not, unless such failure is harmless, permitted to use as evidence at a trial... any witness or information not so disclosed.

According to the court in *Sherrod v. Lingle,* 223 F.3d 605 (7th Cir. 2000):

> ... Rule 37 precludes the trial judge from imposing the exclusion sanction unless it finds the party's

> failure to comply with Rule 26(a) was both unjustified and harmful to the opposing party.
> *Sherrod, supra,* at 612 (emphasis added).

The court concluded:

> Because Rule 37 does not require sanctions against a non-disclosing party if that party's violation was harmless, the district court abused its discretion by excluding Sherrod's experts without any indication that the defendants had been harmed by his discovery violation.
> *Sherrod, supra,* at 613 (emphasis added).

Some factors courts consider in determining the propriety of sanctions under

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Rule 37 include: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date. *David v. Caterpillar Inc.*, 324 F3d. 851, 857 (7th Cir. 2003); *Nalder v. West Park Hospital,* 254 F.3d 1168, 1177-1178 (10th Cir. 2001); *Crismonia v. Parkway Mortgage, Inc.*, 286 B.R. 604, 611 (E.D. Pa. 2002).

i. prejudice or surprise

Failure to comply with Rule 26 will not result in exclusion of the expert's testimony unless the failure is demonstrated by the party seeking exclusion to have been prejudicial. *Lohrenz v. Donnelly,* 223 F.Supp.2d 25, 35 (D.

Dist.Col. 2002); *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 204 F.R.D. 309, 311 (W.D. La. 2001). In *Lakeman v. Otis Elevator Co.*, 930 F.3d 1547, 1554 (11th Cir. 1991) experts testified not only regarding the dangerousness of certain chemicals and the cause of death but also regarding the adequacy of labels, which subject had not been disclosed in the expert report. The court found there was no prejudice because counsel was well-versed in the labeling of toxic chemicals and was capable of cross-examining the experts effectively. In *Farmland Industries v. Morrison - Quirk Grain Corp.*, 54 F.3d 478, 482 (8th Cir. 1985) (emphasis added) there were deficiencies in the expert designation, however the witness was redeposed. The court declared, "This additional deposition provided Morrison with adequate information to cure any deficiencies in [the] designation. Morrison was neither surprised nor confused at the substance of [the expert's] testimony. This lack of surprise prevented prejudice from occurring."

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Buckley's identity as a witness was disclosed early in the case. He was deposed more than two years before the trial. During his deposition he described the opinions to which he would testify. His bio-bibliography and samples of the documentation he created in the course of his investigation were produced at the deposition and used for cross-examination. Contrary to counsel's claim at argument on the motion, Buckley was not deposed as a fact witness, but as an expert witness.[19] Little of the matter to which he testified

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[19] Mr. Buckley's 17 page bio-bibliography was attached to the deposition. Buckley Depo., exh. 1 (ER pp. 120-136). His experience as an expert witness was thoroughly inquired into,

was new to deposing counsel and none of it was surprising, as the scope of the investigation and the opinions to which Buckley would testify had been described in a pretrial statement. Moreover, the matter to which Buckley testified was not technically challenging. No scientific tests or experiments were involved. Counsel was capable of and did conduct a competent deposition during which he learned to the opinions to which Buckley would testify and the bases for them. The Pimentel claimants made no showing of prejudice.

Moreover, the Pimentel claimants waived the right to receive a report before the deposition by conducting the deposition without it, in violation of the mandatory provision of Rule 26 that, "Ifa report from the expert is required..., the deposition shall not be conducted until atter the report is provided." The mandatory language of the rule prohibits the taking of an expert deposition of an expert who is required to

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including the number of times he qualified as an expert witness, the number of times he testified as an expert in court and in deposition, the areas in which he has qualified as an expert, and the percentages of his retention for plaintiffs and defendants.

Mr. Buckley was deposed about the scope of his investigation, the identification of all individuals with whom he worked, the nature and time frame of the documents that he reviewed, and the access he was afforded to various financial records.

Mr. Buckley was asked classic expert deposition questions as to his conclusions and the bases for them. *See e.g.*, Buckley Depo. (ER pp. 75-77, 79, 89, 91, 97-98).

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report unless a report has been produced in advance of the deposition. The obvious purpose of the rule is to protect the deposing party from surprise. If a party proceeds with a deposition, it has, of necessity, waived the right to receive a report in advance, because it cannot be given in advance once the deposition has been taken.

ii. the ability of the opposing party to cure the prejudice

Even actual prejudice to an opposing party can be cured, and it is the opposing party's obligation to attempt to cure any prejudice. In *Crismonia v. Parkway Mortgage Inc.*, 286 B.R. 604, 611 (E.D. Pa. 2002) the court stated:

> Assuming a trial court determines that an opposing party would be unfairly prejudiced or surprised by admitting the evidence, the inquiry does not end. The trail court must determine whether the unfair surprise or prejudice is curable.

Another court observed:

> Notwithstanding Rule 37(c), the district court may be found to have abused its discretion if [its] exclusion of testimony results in fundamental unfairness in the trial of the case .... [T]he pivotal issue is whether admission of the evidence will result in incurable prejudice to the resisting party.
> *ABB Air Preheater, Inc. v. Regenerative Environmental Equip. Co. Inc.*, 167 F.R.D. 668, 672 (D. N.J. 1996).

In *Crismonia* the court noted that prejudice can be cured by reopening discovery, permitting the deposition of the expert, granting time to review new expert testimony, permitting the opposing party to counter new expert testimony with expert testimony and permitting the retention of an expert, if necessary. The court concluded, "Exclusion is too drastic a remedy if the prejudice may be readily cured." *Crismonia v. Parkway Mortgage Inc., supra,* 285 B.R. at 611-12.

Parties are required to take steps to overcome prejudice. They are not allowed

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to sit back until trial and then ask the court to exclude their opponent's evidence. In *Intercargo Ins. Co. v. Burlington Northern Santa Fe Railroad,* 185 F.Supp.2d 1103, 1107 (C.D. Cal. 2001) the court refused to exclude expert testimony because the defendant had not sought to compel a more adequate disclosure within a reasonable time. *Id.* In *Nalder v. West Park Hospital,* 254 F.3d 1168, 1178 (10th Cir. 2001) the party failed to ask for a continuance of the trial.

> Thus, plaintiffs never made what likely would have been a successful attempt to cure (or at least mitigate) the alleged prejudicial impact of [the expert's] testimony. A party that has an opportunity to depose an expert, or hire proffered experts but chooses not to, cannot claim unfair surprise.

See also, Porchia v. Design Equip. Co., 113 F.3d 877, 882 (8th Cir. 1997).

Had there been any prejudice to the Pimentel claimants in spite of their having deposed Buckley, there was ample time and opportunity to cure any prejudice. The Pimentel claimants took no steps to do so in spite of a written offer to redepose the witness. They did not seek, either informally or by motion, to obtain more information from the expert witness or to redepose him.[20] They have neither claimed prejudice nor sought to cure any perceived prejudice.

iii. the likelihood of disruption of trial

Courts have shown themselves willing even to delay trial and reopen discovery

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in order to cure surprise or prejudice so that matters may be decided on the evidence. In *Johnson Electric N. Am., Inc. v. Mabuchi Motor Am. Corp.*, 77 F.Supp.2d 446, 458-59 (S.D.N.Y. 1999) the court noted that the court could have

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[20] Counsel for the Pimentel claimants made exactly this argument in favor of deposition testimony he sought to have admitted. Counsel for Arelma/PNB objected to the admission of the deposition testimony on the grounds that they had not been parties to the action when the deposition was taken, had no notice of the deposition and no opportunity to participate. Counsel for the Pimentel claimants argued to the court, "Well, it's true that they weren't a party as of that date. However, they had an opportunity, some two and-a-half years, to examining [the deponent]. In addition, I furnished [counsel for Arelma/PNB] with a copy of the transcript and exhibits after he did come into the case, and Merrill Lynch, I think has represented, Your Honor, that it stood ready, willing, and able during its participation to assist in discovery." Trial Trans. (ER pp. 644-645).

adjourned the hearing, particularly in a bench trial, but the objecting party did not request adjournment and therefore aid not establish prejudice. *See also, Crismonia v. Parkway Mortgage Inc., supra,* 286 B.R. at 612; *McNerney v. Archer Daniels Midlands Co.,* 164 F.R.D. 584, 587 (W.D.N.Y. 1995). In this case, there would have been no delay. Cure, if any were necessary, could have been accomplished in the two years between Buckley's deposition and the trial.

iv. bad-faith or willfulness of the proponent of the evidence

The exclusion of critical evidence is an extreme and drastic sanction, not normally to be imposed absent a showing of willful deceit or flagrant disregard of a court order by the proponent of the evidence. *Meyers v. Pennypack Woods Ownership Ass'n,* 559 F.2d 894, 905 (3d Cir. 1977) *reversed on other grounds* 777 F.2d 113 (3d Cir. 1985); *Bucher v. Gainey Transportation Serv. of Indiana, Inc.,* 167 F.R.D. 387, 389 (M.D. Pa. 1996); *McNerney v. Archer Daniels Midlands Co., supra,* 164 F.R.D. at 587. In this context, lack of diligence does not constitute bad faith. *ABB Air Preheater, Inc. v. Regenerative Environmental Equip. Co. Inc., supra,* 167 F.R.D. at 673.

Courts have recognized a concept of sanction proportionality to the infraction. *Sherrod v. Lingle,* 223 F.3d 605, 612 (7th Cir. 2000). Considering an exclusion ordered by the trial court for expert disclosure failures, the court declared that the sanction must be "proportionate to the infraction." The Court of Appeals reversed the

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district court's exclusion of the expert testimony, noting, among other things, that because both sides were at fault for scheduling difficulties, the delay in finishing the experts' reports was partially justified, *Id.* at p. 613. In *Johnson Electric N. Am., Inc. v. Mabuchi Motor Am. Corp., supra,* 77 F.Supp.2d at 459 the court held that an assertion of privilege, though in error, was not so baseless as to warrant the drastic sanction of striking the testimony.

Although it appears clear to these Appellants that Buckley was not a retained expert and therefore not subject to the report requirement, should the Court conclude that Buckley is subject to the report requirement, the question must be considered close enough to preclude bad faith and to render exclusion of the testimony disproportionate to the infraction, particularly in the context of this case where the district court excluded virtually all of the Roxas claimants' evidence, thereby depriving them of the opportunity to present their case.

The pretrial statement accurately described the opinion testimony it was expected Buckley would offer, which he did in fact offer when his deposition was taken. Moreover, following the deposition, approximately a year and a half before the pretrial conference, counsel for the Roxas claimants communicated to opposing counsel his doubts that Buckley was subject to the report requirement and offered the witness for redeposition. There was no ambush, there was no bad faith or gamesmanship except on the part of the Pimentel claimants who waited all that time and then moved to exclude Buckley's testimony at the pretrial conference. The exclusion of Buckley's expert testimony, when there

was substantial justification and in the absence of bad faith was a violation of the provisions of Rule 37(c)(1) and an

[p. 42]

abuse of discretion.

The erroneous exclusion of Buckley's expert testimony was prejudicial to the Roxas claimants because Buckley's testimony was vital to arguments central to their claim - namely that they have an ownership claim to the stake because it was funded with assets stolen from them, and that title to stolen property does not pass to a thief. Exclusion of Buckley's testimony was also prejudicial because it would have defeated an element of the Pimentel claim - namely, that the Marcos assets in the fund were legitimately acquired and subject to their general tort claim.

Buckley's testimony refuted the court's erroneous determination that there was no evidence that the Marcos accounts were funded with stolen assets, upon which judgment in favor of the Pimentel claimants depends. *See* Amendment to Finding of Fact 14 (ER p. 690); Conclusion of Law 12 (ER p. 687); and Conclusion of Law 19 (ER p. 688). Buckley testified that the funds were ill-gotten and that their most probable source was the Japanese treasure discovered by Roxas. He also testified that both he and the PCGG identified the money that funded the Arelma account as ill-gotten gains. Buckley Depo. (ER pp. 80-81, 83, 89, 91, 98, 111, 114-115.) The excluded testimony also included the following:

> I don't care how successful Mr. Marcos was as an attorney, you don't generate wealth in the millions of dollars and billions of dollars ..... So it came from

> somewhere. The most likely source, the most probable source, is the treasure that the Japanese left buried in [the Philippines] when they exited the country.
> Buckley Depo. (ER p. 91).

After testifying to the trail of the money from Marcos to Switzerland to Panama to

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New York,[21] Buckley further testified:

> ... it follows a pattern in which he set up a lot of what I call dummy corporations and transferred assets into them. And this is not atypical of people who are trying to hide monies. So if you happen to find one pot of gold, then you may miss the others. So I think it was part of a general pattern of concealment.
> Buckley Depo. (ER p. 89).

Buckley also testified regarding the Japanese treasure hidden in the Philippines:

> I don't think there's any doubt it existed. And it was the source of - - the bulk of Marcos' wealth which his own colleague, "Zobel," estimated in excess of a hundred billion dollars... Marcos himself tried to sell gold worth -- as I recall, in excess of a trillion dollars worth of gold... I know that he was dealing

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[21] See Buckley Depo. (ER p. 63).

with a group of Australians that were acting as brokers. Buckley Depo. (ER p. 97).

The proof of the theft of the treasure from Roxas by agents of Ferdinand Marcos was established at trial in *Roxas v. Marcos*.[22] Buckley's testimony provides the link between the treasure stolen from the Roxas claimants and the money in the Merrill Lynch account. The exclusion of Buckley's expert testimony was prejudicial error that precluded the establishment of essential elements of the Roxas claimants' case.

V. THE COURT APPLIED AN ERRONEOUS STANDARD AND EXCLUDED DEPOSITION TESTIMONY CONTRARY TO THE HEARSAY EXCEPTION FOR PRIOR TESTIMONY.

At the Pretrial Conference held on Sept. 29, 2003, the Pimentel claimants and Arelma/PNB moved the court to exclude the deposition testimony of Danilo Roxas,

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[22] *Roxas v. Marcos*, Civil No. 88-0522-02, State of Hawaii Circuit Court, First Circuit.

APPENDIX H

MAGAÑA, CATHCART & MCCARTHY
Trial Lawyers Since 1946

Suite 600
1801 Avenue of the Stars
Los Angeles, California 90067-5801
310.553.6630 • 800.742.1019 • FAX 310.407.2295
www.mcmc-law.com • info@mcmc-law.com

December 7, 2006

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

In re: Merrill Lynch etc. vs. Arelma, S.A., et al.
Appeal Numbers: 04-16401, 04-16503, 04-16538
Notice of Related Cases (FRAP 28-2.6)

Dear Clerk:

It has come to my attention that the claims of appellee, Mariano Pimentel, to the interpleaded fund are barred by the statute of limitations on judgments. H.R.S. 657. Judgment was rendered in MDL 840 on February 3, 1995. The ten-year statute of limitations ran on February 3, 2005 while this action was pending. The record indicates that

counsel for the class, in M.D.L. 840, applied to the trial court for an extension AFTER the statute had run. This is not permitted under the language of the statute. As a result, there is an appeal pending in this Court beating Appeals Docket #: 06-16301.

Obviously, the Estate of Roger Roxas and The Golden Budha Corporation wish to urge the application of the Hawaii statute which conclusively presumes that the judgment has been paid in full.

Most respectfully,

/s/
DANIEL C. CATHCART

DCC:tr

cc: Jeffrey S. Portnoy, Esq.
Cades Schutte Fleming & Wright
-and-
A. Robert Pietrzak, Esq.
Sidley Austin Brown & Wood, LLP
Attorneys for MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED